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Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

KAISER ALUMINUM AND CHEMICAL CORPORATION,
Petitioner,
v.
UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Fifth Circuit's decision should be vacated in light of this Court's recent controlling decision in *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 1662-63 (2000), when the court below failed to mention or consider the intervening opinion and when the court below held that it was required to give *Chevron* deference to an agency's interpretation of the criminal statute the agency administers, although (1) the agency interpretation to which the court deferred has no force of law and (2) the agency's interpretation is broader than the ordinary meaning of the undefined statutory term.

Whether the Fifth Circuit's statutory construction, that the language of a regulatory statute with criminal application gives the agency "broad discretion" to determine the applicability of the statute, in a way broader than the ordinary meaning of the statutory language, is permissible in light of non-delegation principles and the constitutional principle that only Congress can determine the ambit of a criminal law.

Whether *Chevron* deference, in the context of an investigation into grounds for criminal prosecution, conflicts impermissibly with this Court's rule of lenity.

Whether the Fifth Circuit, whose law directly conflicts with that of other circuits and also appears inconsistent with this Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), correctly interprets the work product rule, Fed. R. Civ. Pro. 26(b)(3), to mean that, when litigation is not "imminent," the party seeking work product protection for documents has the additional burden to show that the "primary purpose" of the documents was to aid in the anticipated litigation.

Whether a qualified common law privilege exists in the federal courts for self-critical analysis.

PARTIES TO THE PROCEEDING

The petitioner, Kaiser Aluminum and Chemical Corporation, is the appellant in the Fifth Circuit Court of Appeals below.

The respondent is the appellee below, the U.S. Department of Labor, Mine Safety and Health Administration (MSHA).

Other appellants below include the following employees of Kaiser: Don Williamson, William Kirsch, Don Phillips, O.J. "Bud" Garcia, Matt Matthews, David Scott Halphen, Pat Harrington, Brian Hatfield, Darrell Jackson, Glenn Lynagh, Anthony Vicknair, Kelly Duffy, Mervyn "Blackie" LeBlanc, John Haley, Richard Osborne, Seymour Brown, George Guelfo, Steve Bacala, William Whitson Conway, Pete Johnston, Terry Denova, Forrest Benge, Reuben Cole, Herman Farlough, Walter Hansley, Dennis Hawes, Kenneth Hymel, Jr., Brett Hebert, Joseph Kernan, Abe Lowe, David Steele, Earl Veal, Marty Wunstell, Sylvester Batiste, Walter Bounds, and Terry Brouilette.

The National Association of Manufacturers filed a brief *amicus curiae* in the Fifth Circuit in support of Kaiser on the issue of the self-critical analysis privilege.

CORPORATE DISCLOSURE STATEMENT

Kaiser Aluminum and Chemical Corporation is wholly owned by Kaiser Aluminum Corporation, a public corporation. Approximately 63% of the common stock of Kaiser Aluminum Corporation is held directly and indirectly by MAXXAM, Inc., a public corporation. There is no publicly held entity that owns 10% or more of the stock of MAXXAM, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Kaiser Aluminum and Chemical Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 214 F.3d 586. Petitions for rehearing and rehearing *en banc* were denied by the Fifth Circuit *per curiam* in unpublished memorandum opinions. The unpublished opinion of the magistrate below is available through Westlaw at 1999 W.L. 717513. The District Court adopted and affirmed the magistrate's order in an unpublished order issued September 17, 1999 and denied rehearing in an unpublished order issued October 1, 1999. The court ruled from the bench on September 30, 1999, upholding MSHA's assertion of jurisdiction over Kaiser and its employees. The district court's bench ruling on jurisdiction was confirmed in the unpublished order dated October 1, 1999. The decisions, rulings, and orders are included in the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on June 12, 2000. The petitions for rehearing and rehearing *en banc* were denied on August 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional and statutory provisions are reproduced in the appendix.

STATEMENT OF THE CASE

This case arises out of an investigation and public hearing by the Mine Safety and Health Administration (MSHA) into an explosion at Kaiser's alumina refinery located in Gramercy, Louisiana. Kaiser purchases bauxite, mined on the island of Jamaica, and refines it at Gramercy to alumina, a pure white powder. Kaiser's refinery is a freestanding industrial facility, distant from any place where bauxite is mined from the earth.

MSHA was created, and its jurisdiction defined, by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq* (1999). (the "Mine Act"). The stated purpose of the Mine Act is "to protect the health and safety of the Nation's coal and other miners." 30 U.S.C. § 801(g) (1999). MSHA's statutory jurisdiction is limited by 30 U.S.C. § 803 (1999) to "mines," "miners," and "operators of mines." MSHA asserted jurisdiction under the Mine Act to investigate the Kaiser explosion on the theory that Kaiser's alumina refinery is a "mine," and Kaiser's employees "miners," within the meaning MSHA gives to the statute.

Violations of health and safety standards issued by MSHA under the Mine Act are punishable by civil penalties and, in the case of willful violations, by criminal penalties. Criminal and civil penalties may be assessed, not only against the operator of a mine, but also against individual miners, defined as persons working "in a mine," including foremen, supervisors, managers, and executives.

The stated purpose of MSHA's investigation was to seek evidence of violations of the Mine Act.[1] MSHA announced at the hearing that it would refer criminal violations to the U.S. Attorney.[2]

During its investigation, MSHA subpoenaed dozens of current and former Kaiser employees. MSHA also subpoenaed Kaiser documents, including documents relating to the work of the "Overpressure Protection Committee" (OPC), an *ad hoc* committee of Kaiser employees, formed at the initiative of counsel, to analyze certain sensitive safety-related technical issues in anticipation of regulatory and tort litigation.

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[1] 64 Fed. Reg. 42995, 42995 (Aug. 6, 1999).

[2] The presiding officer stated: "If after our complete investigation, we believe there were criminal violations . . . we would have to refer that case to the United States Attorney's Office." Public Hr'g Tr. at 305.

MSHA moved in the United States District Court for the Eastern District of Louisiana, under 30 U.S.C. § 813(b), to enforce the subpoenas. Kaiser and the subpoenaed Kaiser employees, acting individually, had previously moved, in the same court, to quash, challenging MSHA's authority to issue the subpoenas. Kaiser and the Kaiser employees contended that MSHA has no jurisdiction over Kaiser and its employees, because Kaiser's alumina refinery is not a "mine," and Kaiser's employees are not "miners," within the meaning of the Mine Act.

Kaiser also sought protection from discovery of the OPC documents on the ground that they are work product, protected under Federal Rule of Civil Procedure 26(b)(3), and also that they are protected by the common law self-critical analysis privilege.

A. Statement Of The Case Relating To The Jurisdictional Issue.

The jurisdictional issue is whether Kaiser's refinery, and Kaiser's employees working at the refinery, are subject to health and safety regulation by MSHA under the Mine Act. If not, they are regulated by the Occupational Safety and Health Administration (OSHA) under the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.* ("OSH Act").[3]

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[3] The OSH Act, with exceptions not relevant here, applies to all places of employment except those regulated under other statutes, including the Mine Act. 29 U.S.C. § 653(a) and (b)(1) (1999).

The jurisdictional question has continuing importance, beyond the circumstances of this case, to Kaiser and all of its employees: (1) While MSHA regulates "mines," OSHA regulates general industry, including metals refining. OSHA has issued health and safety standards attuned to conditions in metals refining, but MSHA's standards are more appropriate for conditions in the mining industry. (2) Although willful violations of health and safety standards issued under the Mine Act are criminal offenses,[4] violations of the OSHA standards are civil only, unless they result in a fatality (which has not occurred here). (3) The Mine Act authorizes civil fines and criminal penalties against individual mine employees ("miners") who are found to be "agents" of the mine operator and who are found to knowingly authorize, order, or carry out violations of standards issued under the Mine Act.[5] The OSH Act has no comparable provision. (4) Finally, the OSH Act does not authorize investigation by public hearing, a potentially politicized process authorized by the Mine Act[6] and used by MSHA to investigate the explosion at Kaiser's refinery.

MSHA's jurisdictional assertion that Kaiser's refinery is a "mine" is anomalous. It is undisputed that OSHA, not MSHA, has jurisdiction over "refining" of metals. It is also undisputed that the process that occurs in Kaiser's plant is known generally as "refining."[7] MSHA contends nevertheless that the work of the Kaiser refinery is "mining" because the Mine Act, 30 U.S.C. § 802(h)(1), defines the term "mine" to include "facilities . . . used in . . . the milling of . . . minerals." MSHA asserts that, for purposes of the statute, Kaiser's alumina refining is "milling," not "refining."

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[4] 30 U.S.C. § 820(d) (1999).

[5] *Id.* § 820(c) (1999).

[6] 30 U.S.C. § 813 (1999).

[7] *E.g.*, *Refining Bauxite to Alumina* (caption to flow chart illustrating the refining process used by Kaiser), National Geographic, (August 1978) (R. 676 in record of the district court below); Hartman, *SME Mining Engineering Handbook* (2d ed. 1992) at 72 (alumina is produced "by refining bauxite ore"); 40 CFR § 421.10 (2000) (EPA regulation addressing "bauxite refining" by the "Bayer" process used by Kaiser);

The statutory term "milling" is not defined in the Act, but its meaning is well understood in the mining and metals industry. "Milling" and "refining" are understood to be different. As ordinarily understood in the industry, "milling" of minerals involves fairly simple procedures that are applied *before* ore is shipped for refining. "Refining" is a later process with controlled, sequential steps, leading, stage by stage, to a purified ("refined") product. As stated in a letter from the Secretary of Interior contained in the legislative history of the predecessor statute to the Mine Act, the statutory term milling "refers in general to the processes of grinding, washing, concentrating, and sizing of the minerals. In brief, milling *ends* where refining or manufacturing begins."[8]

Consistent with the ordinary meaning of the terms, a 1979 Interagency Agreement between MSHA and OSHA[9] states that "refining," subject to OSHA jurisdiction, begins at the point where "milling" is completed and "material enters the sequential processes to produce a product of higher purity." It is uncontested that Kaiser's refining process is a "sequential" process and that it is used to produce pure white alumina, a "product of higher purity," from bauxite ore. The

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Rev. Ruling 77-63, 1977-1 C.B. 60 (1977) (describing the Bayer process used by Kaiser as "refining").

[8] As quoted in *Pullman Brick Company, Inc.*, 3 OSHRC 633, 1973 W.L. 4061, *15 (1973) (a decision by the Occupational Safety and Health Review Commission) (emphasis supplied).

[9] 44 Fed. Reg. 22827, 22830 (April 17, 1979) (included in the appendix hereto).

1979 Interagency Agreement, while recognizing that OSHA, not MSHA, has statutory jurisdiction over "refining" of metals, nevertheless assigns "alumina plants" (undefined) to MSHA, stating simply, without analysis or explanation, that "[p]ursuant to the authority in section 3(h)(1) [30 U.S.C. § 802(h)(1)] to determine what constitutes mineral milling considering convenience of administration, the following jurisdictional determinations are made: (a) MSHA jurisdiction includes . . . alumina and cement plants." [10] Acting under that agreed allocation of jurisdiction, which does not have the force of law, MSHA has asserted jurisdiction over Kaiser's refinery.

The District Judge below, in a September 30, 1999 ruling from the bench, confirmed by a written order issued October 30, upheld MSHA's jurisdictional assertion. The Judge said that, while "an average lay person would not consider the Gramercy Plant to be a 'mine,'" doubts about the scope of the statute must be resolved in favor of inclusion of a facility within the coverage of the Act.[11]

On appeal, the Fifth Circuit found permissible MSHA's position that Kaiser's refining process is "milling" and that Kaiser's refinery is therefore a mine. The Fifth Circuit found that "milling" is not defined in the statute. The court found that, "instead . . . Congress expressly delegated to the Secretary of Labor authority to determine 'what constitutes mineral milling for purposes' of the Act."[12]

The statutory language relied on by the Fifth Circuit to create the "express delegation," the last sentence of 30 U.S.C. §802(h)(1), states that when making a determination of what constitutes "mineral milling subject to the Act," the Secretary shall give "due consideration" to the convenience of administration that would result from having the safety of miners employed at one physical establishment regulated by a single entity (OSHA or MSHA) (rather than partially by MSHA and partially by OSHA). The Fifth Circuit interpreted that language to be a free standing delegation to define "milling" in the circumstances of this case, where Kaiser's refinery is not adjacent to any mine, and the bauxite refined by Kaiser is mined from the earth one thousand miles away, on the island of Jamaica.

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[10] *Id.* at ¶B.6.a. The pertinent language is quoted in full. The ellipses indicate only the omission of a number of other listed types of facilities.

[11] Sept. 30 Hr'g Tr. at 50-51, and 72.

[12] *Kaiser Aluminum and Chemical Co. v. U.S. Dep't of Labor*, 214 F.3d 586, 591.

The Fifth Circuit acknowledged that the 1979 Interagency Agreement between OSHA and MSHA, as well as earlier 1974 Memorandum of Understanding between OSHA and the predecessor agency to MSHA, both state that "refining," which is jurisdictional to OSHA, not MSHA, "commences at the point where milling, as defined, is completed and material enters the sequential processes to produce a product of higher purity." The court also agreed that, under the standard dictionary definitions of "milling" presented to the court by Kaiser, "the Bayer process of alumina production [used by Kaiser] does not much sound like milling."[13]

The Fifth Circuit found, "despite these arguments,"[14] that the court was required, by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to defer to the agency's assertion of jurisdiction under the Mine Act—unless the agency's position is "arbitrary, capricious, or manifestly contrary to the statute."[15]

As support for its finding that MSHA's interpretation is owed *Chevron* deference, the Fifth Circuit referred to only one published agency statement: the listing in the 1979 Interagency Agreement (which does not have the force of law), assigning, without explanation, "alumina plants" to MSHA. The court also based its decision to give *Chevron* deference on (1) two brief extracts from dictionary definitions, supplied by MSHA's appellate counsel on brief, and (3) two brief statements from the legislative history which do not mention "milling."

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[13] *Id.* at 591-92.

[14] *Id.* at 592.

[15] *Id.* at 591.

The Fifth Circuit did not consider or mention this Court's recent decision in *Christensen v Harris County*, 529 U.S. 576, 120 S. Ct 1655, 1662-63 (2000), which was handed down after oral argument and which holds that *Chevron* deference to such materials is not permitted.

The Fifth Circuit distinguished and refused to follow a recent decision of the Eighth Circuit, *Herman v. Associated Electric Cooperative*, 172 F.3d 1078, 1083 (1999), which had rejected MSHA's assertion of jurisdiction over an electric utility whose coal handling operations, the Eighth Circuit found, "are more properly characterized as 'manufacturing' than 'mining.'"

The Fifth Circuit did not address Kaiser's contention that, under this Court's rule of lenity, the Mine Act, a criminal statute, must be strictly construed.

Kaiser requested rehearing and rehearing *en banc*, on the ground that the panel's decision conflicts with this Court's holding in *Christensen*. Kaiser also argued that the Fifth Circuit's interpretation of the Mine Act creates an unconstitutional delegation to MSHA to determine its jurisdiction and the applicability of a criminal law in a manner contrary to the ordinary meaning of the statutory term "milling." It argued that, because the Mine Act is a criminal statute, the rule of lenity requires that it be strictly construed.

Rehearing and rehearing *en banc* were denied, *per curiam*, without opinion.

B. Statement Of The Case Relating To Privilege Issues.

MSHA's subpoena sought documents relating to the work of Kaiser's Overpressure Protection Committee (OPC). Declarations to the district court, by a Kaiser attorney and a Kaiser employee, explain that the committee was established by counsel to perform highly sensitive analytical work in anticipation of litigation, when there was a perceived serious likelihood of regulatory litigation or civil tort litigation. (That purpose is also stated in a formation document of the OPC.) The OPC documents include opinion work product and legal analysis by Kaiser's attorney, as well as technical analyses, related to the same issue, by non-attorneys. Kaiser contended that the OPC documents are work product, protected by Federal Rule of Civil Procedure 26(b)(3), and that they consist of candid self-criticisms and self-analyses, protected by the self-critical analysis privilege.

The OPC documents were reviewed *in camera* by the magistrate. The magistrate stated that the rule in the Fifth Circuit is that the party seeking work product protection has the burden to show that "the primary motivating purpose behind the creation of the documents [is] to aid in possible future litigation," and he found that Kaiser had not met its burden. The magistrate found that the "primary purpose" of the OPC "was to evaluate safety as well as regulatory and legal issues." He found that Kaiser was, "in part, concerned with whether the proposal under review would favor its legal position." The magistrate concluded that "many" of the OPC documents were generated "because of safety, rather than litigation, issues."

He therefore denied work product protection to *all* of the OPC documents, including the opinions and analyses of the attorney.

The magistrate denied Kaiser's assertion of the self-critical analysis privilege. He found that the Fifth Circuit has not embraced the privilege and that, if it did, such a privilege would be rejected in this case.

The magistrate's holdings on both privilege issues were affirmed by the District Judge.

On review, the Fifth Circuit affirmed that "the law of our circuit is that the [work product] privilege can apply where litigation is not imminent, as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." Without reviewing the documents,[16] and without further analysis, the Fifth Circuit said "the court below correctly followed Fifth Circuit precedent."[17]

Rejecting the claim of the self-critical analysis privilege, the Fifth Circuit said that the Fifth Circuit "has not recognized" the privilege. Without deciding "whether a self-evaluation privilege should ever be recognized," the Fifth Circuit declined "to recognize such a privilege in the circumstances presented, namely a case where a government agency seeks pre-accident documents."

Petitions for reconsideration and reconsideration *en banc* were denied *per curiam*, without opinion.

REASONS FOR GRANTING THE WRIT

A. Writ of Certiorari is Required to Correct the Unexplained Failure to Consider or Heed This Court's Controlling Christensen Decision.

The precise holding of the Fifth Circuit was that it was obligated to give *Chevron* deference to MSHA's interpretation of the jurisdictional term "milling." The Fifth Circuit's holding conflicts irreconcilably with the holding of this Court's recent controlling decision, *Christensen v. Harris County v. U.S.*, 529 U.S. 576, 120 S.Ct. 1655, 1662-63 (2000). The Fifth Circuit did not mention *Christensen*, either in its June 12 opinion or when it denied rehearing and rehearing *en banc*. For this reason, the Court should grant certiorari for purposes of vacating and remanding in light of *Christensen*.

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[16] On rehearing, Kaiser unsuccessfully requested the court to obtain and review the documents which, unknown to Kaiser, had not been transmitted to the Court of Appeals by the district court.

[17] 214 F.3d at 593.

The Fifth Circuit found sufficient support to require *Chevron* deference in the 1979 Interagency Agreement and in some brief excerpts from dictionary definitions and legislative history cited to the court on brief by MSHA's appellate counsel.

The 1979 Interagency Agreement, the only published agency document relied on by the Fifth Circuit, is an informal agreement worked out between OSHA and MSHA, and it lacks the force of law. Because of its lack of analysis, its vagueness, and its internal inconsistency (finding that OSHA has jurisdiction over refining, but summarily assigning "alumina plants" (undefined) to MSHA), the Interagency Agreement lacks any power to persuade. The legislative history does not address "milling." The dictionary excerpts appear in no agency document except MSHA's appellate brief.

Christensen forbids giving *Chevron* deference such materials:

> Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference. Instead, interpretations contained in formats such as opinion letters are "entitled to respect" but only to the extent that those interpretations have the "power to persuade."[18]

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[18] 529 U.S. at 631, 120 S. Ct. at 1662-63.

The *Christensen* instruction applies squarely to the non-binding and self-contradictory 1979 interagency agreement. Counsel's litigation use of dictionary definitions and legislative history is not due even the "respect" *Christensen* affords to official agency documents. The Fifth Circuit did not find that any of the materials relied on by MSHA had "power to persuade," but found only that they were sufficient to satisfy *Chevron's* "arbitrary and capricious" standard, a standard which *Christensen* has held to be inapplicable.

Certiorari is thus required because the court below has decided an important question of agency jurisdiction, under an important federal statute with criminal and civil penalties, in a way that conflicts directly with *Christensen's* holding.

B. The Fifth Circuit's Interpretation of the Statute, Giving Virtually Standardless Discretion to MSHA to Determine Its Jurisdiction and the Application of the Act, Conflicts With Constitutional Non-Delegation Principles And Must be Reconsidered In Light of This Court's Forthcoming Decision in Browner v. American Trucking Associations.

The Fifth Circuit noted that the jurisdictional term "milling" was not defined by Congress and found that "instead . . . Congress expressly delegated to the Secretary of Labor authority to determine 'what constitutes [jurisdictional] mineral milling for purposes' of the Act."[19] The Court then found permitted, under the "delegated" authority, an agency interpretation of the jurisdictional term that is much more expansive than the ordinary meaning of the word. The Fifth Circuit thus interpreted the statute to mean that Congress intended to delegate undefined and virtually standardless authority to the agency to determine the activity to which the Mine Act, a criminal law, is applicable and therefore to determine the reach of the agency's own jurisdiction.

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[19] *Kaiser Aluminum*, 214 F.3d at 591.

Now before this Court is the question of whether, in a civil context, a statute is impermissibly overbroad when interpreted to permit an agency to exercise delegated powers without a "discernable principle" to channel the agency's exercise of discretion. *Browner v. American Trucking Ass'cs, Inc.*, No. 99-1426 (argued November 7, 2000). The D.C. Circuit, in the opinion being reviewed in *Browner*, had said that such an interpretation of an environmental regulatory statute would create an "unconstitutional delegation . . . of legislative power." *American Trucking Ass'cs v. EPA*, 175 F.3d 1027, 1034 (1999). The Fifth Circuit's holding is inconsistent with the holding of the D.C. Circuit which is now being reviewed, and this Court's decision in *Browner* may well control the decision in this case.[20]

However, because the Mine Act is a criminal statute, being applied in this case in an investigatory and potentially prosecutorial manner, this case presents the non-delegation issue more starkly than does the civil proceeding at issue in the *Browner* case. Whatever the strength of the non-delegation principles in a civil context, only the legislature has the constitutional power to define criminality. Criminal statutes have been struck down on separation of powers grounds, under the "void for vagueness" doctrine, when the legislature "fails to establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). The rule of lenity, discussed in the next section of this petition, requiring strict construction of criminal statutes, is likewise based in part on separation of powers principles.

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[20] The constitutional delegation issue in this case arises from the Fifth Circuit's construction of the statute, rather than from the statutory language itself. The provision relied by the Fifth Circuit to create the delegation, the last sentence of 30 U.S.C. § 802(h)(1), by its terms, applies only to facilities located adjacent to acknowledged mining facilities. It does not apply to freestanding manufacturing facilities like Kaiser's which are not physically adjacent to mines regulated by MSHA. The Fifth Circuit could also have adopted the approach taken by the Eighth Circuit in *Herman v. Associated Electric Cooperative, Inc.*, 172 F.3d 1078, 1083 (1999)(finding that an electric utility's coal preparation work is a "manufacturing" activity, rather than "mining," and saying: "Congress designed the Mine Act primarily to protect miners. The Secretary [MSHA] cannot claim that [the utility's] employees are miners"). Instead, the Fifth Circuit attempted to distinguish *Herman*. *Kaiser Aluminum*, 214 F.3d at 592.

The delegation issue is presented more starkly in this case for another reason: According to the Fifth Circuit, Congress, rather than defining the jurisdictional term or intending that it be construed in accordance with its ordinary meaning, "instead" authorized the agency to create new definitions, on an *ad hoc* basis, of the term that determines its jurisdiction. It has been said that the notion "that administrators should decide the scope of [their] own authority. flatly contradicts separation of powers principles,"[21] but Kaiser is not aware of any modern decision of this Court that squarely addresses that question in the context of a standardless congressional delegation of authority to determine jurisdiction under an administrative statute with criminal penalties.[22]

If, in *Browner*, this Court affirms the D.C. circuit on the delegation issue, then remand and reconsideration in light of *Browner* will be required in this case so that the Fifth Circuit can conform its decision to *Browner*. If the D.C. Circuit's approach is not affirmed, in the *Browner* civil context, then *certiorari* will be required to permit this Court to address the important delegation issues raised by this case, but not raised by *Browner*.

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[21] Sunstein, *Constitutionalism After the New Deal*, 101 Harv. .L. Rev. 421, 467-68 (1987).

[22] The Fifth Circuit's construction of the statute thus raises constitutional questions that go beyond whether *Chevron* deference is appropriate when an agency has construed an ambiguous jurisdictional term. *Chevron* deference is "premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 150, 120 S.Ct. 1291, 1314 (2000). The Fifth Circuit's construction of the statute authorizes the agency, not merely to fill "gaps," but also to expand the meaning of the jurisdictional term.

C. Chevron Deference, Applied In the Context of an Investigation With Criminal Implications, Conflicts With the Rule of Lenity, and Only This Court Can Resolve the Conflict Between Two Fundamental Principles of Statutory Construction.

This case presents squarely an unavoidable conflict between two competing principles of statutory interpretation: the *Chevron* deference principle and the rule of lenity. With the increasing criminalization of regulatory law, and increasing resort by prosecutors and agencies to criminal enforcement of administrative statutes,[23] prompt authoritative guidance by this Court on the relative priority of the two principles is needed.

The conflict occurs because, under *Chevron*, ambiguity in statutory language must be resolved by giving "deference" to "reasonable" interpretations by administrative agencies. In contrast, "under our [this Court's] rule of lenity, 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Tanner v. U.S.*, 483 U.S. 107, 131 (1987), quoting *Rewis v. U.S.*, 401 U.S. 808, 812 (1971). This Court's constitutionally based rule of lenity is "premised on two ideas": "fair warning"[24] and constitutional separation of powers. "[L]egislatures, and not courts should define criminal activity." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995) (discussing the dual rationale for the rule of lenity and quoting *U.S. v. Bass*, 404 U.S. 336, 347-350 (1971), *quoting McBoyle v. U.S.*, 283 U.S. 25, 27 (1931)).

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[23] *See, e.g.*, Skrzycki, *The Regulators, For Safety's Sake, Using Criminal Penalties as a Deterrent*, Washington Post, October 10, 2000, at E1.

[24] Kaiser does not contend that it has lacked actual notice of MSHA's jurisdictional position.

It is impossible to apply both *Chevron* and the rule of lenity to the same agency interpretation of an undefined or ambiguous statutory term. One interpretive canon or the other must give. Although the question is becoming increasingly important, the decisions of this Court and the courts of appeals provide almost no guidance on how to resolve the conflict. In this case, by rejecting, *sub silentio,* Kaiser's argument for the rule of lenity, the Fifth Circuit made the implicit choice that *Chevron* trumps the rule of lenity in the context of a potentially criminal investigation. To Kaiser's knowledge, this Court has never said whether that is the right choice.

This Court has decided that the rule of lenity does apply to the construction of a regulatory statute when violation of the statute is punishable by criminal penalties. In *United States v. Thompson/Center Arms Coal*, 504 U.S. 505, 518 n.10 (1992), this Court construed, in a civil case, a tax with "criminal applications."[25] The plurality opinion, in which three justices joined, applied the rule of lenity because the statute could be enforced criminally. In a concurring opinion, Mr. Justice Scalia, joined by Mr. Justice Thomas, agreed with the plurality "that the application [of the statute] is sufficiently ambiguous to trigger the rule of lenity."[26] The approach of the plurality, joined in by the two concurring justices, was based on the axiom that a statute must have the same meaning in a civil context that it has in a criminal context. That principle was recognized long ago in this Court's unanimous 1954 decision in *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296:

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[25] The plurality noted that the statute's criminal provisions were applicable without a requirement of willfulness, but the Court's discussion (at n. 10) of the application of rule of lenity to a statute with "criminal applications" did not depend on willfulness or lack of willfulness.

[26] *Thompson*, 504 U.S. at 519.

> It is true . . . that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. . . . [I]t would do violence to the well-established principle that penal statutes are to be construed strictly.

The relative priority of the rule of *Chevron* and the rule of lenity was addressed briefly in Mr. Justice Scalia's concurring opinion in *Crandon v. United States*, 494 U.S. 152, 177-78 (1990). In *Crandon*, the Court majority opinion applied the rule of lenity, without considering *Chevron*, to interpret a criminal statute applicable to payments to public officials. Mr. Justice Scalia, referring to written administrative interpretations by the Department of Justice and administrative agencies, mentioned *Chevron* but said "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to [*Chevron*] deference."

The unresolved conflict between *Chevron* and the doctrine of lenity has been also been a major concern addressed by commentators and judges. *See* Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469 (1996); Note, *Increased Judicial Scrutiny for Administrative Crime*, 77 Cornell. L. Rev. 612 (1992); Greenberg, *Who Says It's A Crime?: Chevron Deference to Agency Interpretation of Regulatory Statutes That Create Criminal Liability*, 58 U. Pitt. L. Rev. 1 (1996); Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57 (1998); Chapman, *Has The Chevron Doctrine Run Out of Gas? Senza Ripieni Use of Chevron*

Deference or the Rule of Lenity, 19 Miss. C.L. Rev. 115 (1998). In the D.C. Circuit, the "troublesome" conflict between *Chevron* and the rule of lenity was observed in an opinion by Judge Silberman, joined by Chief Judge Mikva and Judge Wald, dissenting to the denial of rehearing *en banc* in *Sweet Home Chapter v. Babbitt*, 30 F.3d 190, 194 (1994), *aff'd sub nom Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995). Judge Silberman explained:

> I find this case quite troublesome, as much for what is not argued by the parties, and therefore not discussed by the court, as for what is. Keeping in mind that we are dealing with a criminal statute, I am not at all sure that *Chevron* even governs our review. *Cf. United States v. Thompson/Center Arms Co.* That is to say, the *Chevron* presumption—that Congress has delegated to the administrating agency primary authority to reconcile ambiguities in statutory languagemay not apply when the statute contemplates criminal enforcement. *Cf. Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994).

Sweet Home Chapter was reviewed by this Court. On review, however, this Court did not resolve the conflict and did not address whether *Chevron* trumps the rule of lenity in investigations and enforcement actions. The Court said only "we have never suggested that the rule of lenity should provide the standard for reviewing *facial challenges to administrative regulations* whenever the governing statute authorizes criminal enforcement." 515 U.S. at 704 n. 18 (emphasis supplied).

Decisions of the circuit courts of appeals have been inconsistent and have provided little guidance on how the conflict should be resolved. Most often, the circuit court decisions, like the Fifth Circuit's decision in this case, have avoided confronting the conflict simply by applying one of the two canons and ignoring the existence of the other. One D.C. Circuit decision, in an opinion by Judge Starr, *United States v. McGoff*, 831 F.2d 1071 (1987), did confront the issue directly, declaring that, in the interpretation of a criminal statute (the Foreign Agents Registration Act), "we are . . . far outside *Chevron* territory" and that, "in this criminal context, we owe no [*Chevron*] deference to the Government's interpretation of the statute." [27].

The Fourth Circuit, in *National Rifle Association v. Brady*, 914 F.2d 475 (1990), applied *Chevron* deference to uphold regulations under a statute that punished violations with criminal penalties. In language that suggests openness to an approach different from that of the Fifth Circuit in this case, the Fourth Circuit implied that the result could have been different, had the issue not arisen in the context of a facial challenge to the regulations:

> Many of the cases . . . on which the NRA relies in making this argument [for lenity] involve the application of the rule of lenity in criminal prosecutions and are simply inapposite to questions of deference to agency regulations.

914 F.2d at 480 n.3.

The Seventh, Eighth, and Eleventh Circuits have applied *Chevron* deference in criminal cases (deferring to agency construction of a sentencing statute), without mentioning the rule of lenity. *Dawson v. Scott*, 50 F.3d 884, 886-87 (11th Cir. 1995); *Moreland v. U.S.*, 968 F.2d 655, 656-59 (8th Cir. 1992) *vacated on other grounds*, 932 F.2d 690 (1991) (*en banc*); *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989).

The "troublesome" conflict between the rule of *Chevron* and the rule of lenity will remain unresolved and unresolvable until this Court provides the necessary guidance.

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[27] 831 F.2d 1077, 1080 n.17.

D. The Circuits Are Divided Over The Fifth Circuit's "Primary Purpose" Restriction on the Work Product Privilege, And the Fifth Circuit's Law Is Inconsistent With This Court's Upjohn Decision.

Rule 26(b)(3), Federal Rules of Civil Procedure, based on this Court's decision in *Hickman v Taylor*, 329 U.S. 495, 510 (1947), codifies a qualified privilege for "work product" materials prepared "in anticipation of litigation." Work product protection is based on "strong public policy." *United States v Nobles*, 422 U.S. 225, 236 (1975). In *Hickman*, this Court warned that, in the absence of protection for materials prepared "with an eye to" litigation, "much of what is now put down in writing would remain unwritten," the quality of legal advice would suffer, and the "effect on the legal profession would be demoralizing."

Unlike its sister circuits, the Fifth Circuit requires more than that protected material be prepared "in anticipation of litigation." It adds a "primary purpose" test as well. As stated by the Fifth Circuit in the decision below, "the law of our [Fifth] circuit is that the privilege can apply where litigation is not imminent as long as the *primary motivating purpose* behind the creation of the document is to *aid* in possible future litigation." [28]

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[28] 214 F.3d at 593 (emphasis supplied). The Fifth Circuit's "primary purpose" restriction does not have its origin in the text of the rule or in any opinion of this Court. The "primary purpose" language first made its appearance in Fifth Circuit jurisprudence in *dicta* in *United States v. Davis*, 636 F.2d 1028, *cert. denied*, 454 U.S. 862 (1981). Since there was no prospect of litigation in *Davis*, the *Davis dicta* have been correctly characterized by the Second Circuit as "a statement going far beyond the issues raised in the [*Davis*] case." *U.S. v Adlman*, 134 F.3d 1194, 1198 (1998). The *Davis dicta* were first applied as a binding rule in *United States v. El Paso Company*, 682 F.2d 530, 542 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

This Court has not yet directly addressed the work product law of the Fifth Circuit. However, The Fifth Circuit's law appears facially inconsistent with this Court's holding and with the reasoning of Chief Justice (then Justice) Rehnquist's opinion for a unanimous Court in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (affording work product protection to documents produced during internal investigation of "questionable" payments). In *Upjohn,* this Court affirmed work product status without any suggestion either that litigation was "imminent" or that the "primary purpose" of the material was to aid in the anticipated litigation.

As will be shown below, although there is some ambiguity in the approach of some of the circuits, other courts of appeals have not followed the work product law of the Fifth Circuit. The Second Circuit recently considered at length and squarely rejected the Fifth Circuit's law. *U.S. v. Adlman*, 134 F.3d 1134 (1998). Holdings of at least the D.C. and Seventh Circuits are irreconcilably inconsistent with the Fifth Circuit's law. *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124 (D.C. Cir. 1987) (sustaining work product claim where documents were prepared for a business purpose but because of anticipated litigation); *In re Special September 1978 Grand Jury*, 640 F.2d 49, 61-62 (7th Cir. 1980) (sustaining work product protection for reports prepared for use in the filing of legally required state campaign contribution reports).

The Fifth Circuit's "primary purpose" rule has nevertheless created mischief in the federal courts outside the Fifth Circuit. As will be shown below, it has been followed, unpredictably, in scattered, unappealed discovery rulings by district courts outside the Fifth Circuit. The resulting disarray and uncertainty itself undermines the privilege. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. Only this Court can dispel the uncertainty.

The circuit split is discussed and documented by the Second Circuit in *Adlman* and in Moore's Federal Practice (3d ed.) 26.70[3][a] (2000). Professor Moore finds the Second Circuit's reading of Rule 26(b)(3) "more persuasive" than the Fifth Circuit's,

> The "because of" approach adopted by the Second Circuit is the more persuasive view. Regular course of business and in anticipation of litigation are not always mutually exclusive and dichotomous fields. Many business decisions are made in anticipation of the inevitable litigation. The "because of" inquiry often offers a more administrable standard, effectively resolving uncertainty at the margins in favor of work product protection. At the same time, protection is not unduly expanded if the document would not have been produced but for the anticipated suit.

As stated in the Second Circuit's *Adlman* discussion,[29] the Second, Third, Fourth, Seventh, Eighth and D.C. Circuits all apply the "because of litigation" test set out in the Wright and Miller Federal Practice treatise: [30] that a document is prepared "in anticipation of litigation" if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared because of the prospect of litigation." Under the "because of litigation" test, as the Second Circuit found, there is no burden to show that the purpose of protected work product is to actually "aid" in the anticipated litigation or that such litigation "aid" is its "primary purpose."

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[29] *Adlman*, 134 F.3d at 1202.

[30] Wright, Miller & Marcus, 8 *Federal Practice and Procedure* § 2024 at 343 (1994). The Second Circuit cited the following cases to document the use of the Wright and Miller formulation in the other circuits: *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987), *cert. den.*, 484 U.S. 917 (1987). *Senate of Puerto Rico v. U.S. Dep't. of Justice*, 823 F.2d 574, 586 (D.C. Cir. 1987).

The issue is clouded in some of the circuits due to an apparent failure by some courts to distinguish clearly in their *dicta* between the meaning and implications of the "primarily to aid in litigation standard" and the "because of" standard.[31]

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[31] While the Second Circuit is correct that the Seventh Circuit does not apply the "primarily to aid in litigation" rule, one decision, *Binks Manufacturing Co., v. National Presto Industries, Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1983), included, with approval, a lengthy block quotation of *dicta* by a magistrate in the District of Columbia District Court in *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D.D.C. 1982). In the course of a general discussion of the work product privilege, the quoted *Janicker dicta* included language to the effect that the primary purpose of work product is to aid in litigation. Although the Seventh Circuit in *Binks* did not actually apply a "primary purpose" test, some district courts in the Seventh Circuit, in unreviewed decisions, have interpreted the *Binks* citation of the *Janicker dicta* to establish the "primary purpose" test as the rule in the Seventh Circuit. *Hugley v. The Art Inst. of Chicago*, 981 F. Supp. 1123, 1128-29 (N.D. Ill. 1997), *Stout v. Illinois Farmers Ins. Co.*, 852 F. Supp. 704, 705 (S.D. Ind. 1994). At least one district court in the Seventh Circuit, citing the Second Circuit's *Adlman* decision and the "controversy among the circuits," did not apply the test, describing the *Binks* language as *dicta*. *U.S. v. South Chicago Bank*, 1998 W.L. 774001 (N.D. Ill. 1998).

The Third Circuit, in *United States v. Rockwell International*, 897 F.2d 1255 (1990), in *dicta*, quoted the Fifth Circuit's "primary purpose" language but said that the Third Circuit's own "analogous standard" is the Wright and Miller "because of" standard. One magistrate in the Third Circuit has interpreted the *Rockwell dicta* to impose a "primary purpose" restriction. *Maerton v. Armstrong World Indus.*, Inc., 172 F.R.D. 143, 147 (D.N.J. 1997).

The Fourth Circuit, while following the Wright and Miller "because of" test, has said that application of the work product privilege, when a document has multiple purposes, requires a determination of the "driving force behind the preparation" of the document. *National Union Fire Ins.*

The Fifth Circuit's rule has been followed, on an unpredictable basis, in unreviewed decisions in courts outside the Fifth Circuit. The Fifth Circuit's rule was adopted, in an opinion written by a Fifth Circuit judge, by the Temporary Emergency Court of Appeals. *U.S. v. Gulf Oil Corporation*, 760 F.2d 292, 296 (1985). More troubling to attorneys who must try to predict whether work product will be protected, the Fifth Circuit's rule has been slowly percolating through some of the district courts, as a number of judges and magistrates outside the Fifth Circuit have followed the primary purpose test in unreviewed decisions.[32] Opinions of some district courts in the Third and Seventh Circuits are discussed in note 30, *supra*. Outside those circuits, the district courts that have followed the Fifth Circuit's rule seem to have relied on the Fifth Circuit's jurisprudence,[33] on the *Gulf Oil* decision of the Temporary Emergency Court of Appeals,[34] or on a line of district court cases citing the *Janicker* magistrate's *dicta*.[35] Other district

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Co. v. Murray Sheet Metal Co., supra, 967 F.2d 980, 984 (1992). That formulation differs from the Fifth Circuit's rule because it does not appear to require that the "driving force" be exclusively or primarily to "aid" in the litigation itself.

[32] *E.g. McEwen v. Digitran Systems, Inc.*, 155 F.R.D. 678, 683 (D. Utah 1994) (citing other district court cases in the Tenth Circuit); *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618 (D. Co. 1998); *McMahon v. Eastern Steamship Lines, Inc.*, 129 F.R.D. 197, 199 (S. D. Fla. 1989); *Burroughs Welcome Co. v. Barr Laboratories, Inc.*, 143 F.R.D. 611, 617-18 (E.D. N.C. 1992); *U.S. v. Bell*, 1994 W.L. 665295 at *4 (N.D. Cal. 1994), *Public Citizen Inc. v. Department of State*, 100 F.Supp.2d at 30 (D.D.C. 2000); *Evans v. Atwood*, 177 F.R.D. 1, 7 (D.D.C. 1997).

[33] *Griffith v. Davis*, 161 F.R.D. 687, 698 (C.D. Cal. 1995).

[34] *Aull v. Cavalade Pension Plan*, 185 F.R.D. 618 (D. Colo. 1998); *Gibco, Inc. v. Ingham*, 185 F.R.D. 296, 299 (D. Colo. 1997).

[35] *Public Citizen, Inc. v. Department of State*, 100 F.Supp.2d 10, 30 (2000).

courts outside the Fifth Circuit have considered and rejected the Fifth Circuit's test.[36]

The confused state of the law in the federal courts, and the resulting uncertainty for lawyers and their clients has been noted by practitioners and commenters.[37]

The conflict (and lack of clarity) among the circuits, and the resulting disarray among the district courts, undermines, nationwide, the "strong public policy" embodied in the work product rule. Participants in the national economy know that they are susceptible to being sued anywhere in the country. When the meaning of Rule 26(b)(3) varies not only from circuit to circuit but from judge to judge (outside the Fifth Circuit), attorneys and their national clients cannot predict whether a document prepared in anticipation of litigation will be protected (if there is possibility of a dispute about the document's "primary purpose"). The uncertainty itself causes the very problems *Hickman* sought to avoid: analyses that remain unwritten, advice that is reduced in quality and professionalism, and "demoralization" of the legal profession.[38] Only a prompt and definitive ruling by this Court can provide the certainty that is needed by the legal profession and its clients.

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[36] *See e.g. Picard Chemical, Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679 (W.D. Mich. 1996), *See also*, *Adlman*, *supra*, and district court cases cited therein. 134 F.3d at 1201.

[37] *See e.g.* Flannery and Milano, *The Confusion Continues: Protection of Internal Corporate Investigation Materials under the Attorney-Client Privilege and Work Product Doctrine, Revisited*, Practicing Law Institute, 29th Annual Institute of Securities Regulation, 1023 PLI/Corp. 519 (1997); *Circuit Split Roundup*, 66 U.S. Law Week 2597 (1998); Note, *Business Planning as it should be: Why Adlman Should Be the Standard When Interpreting the Work Product Doctrine*, 34 Val. U. L. Rev. 201, 219-231 (1999) (noting circuit split (at 219-220) and lack of a clear national standard (at 228)); Special Project, *The Work Product Doctrine*, 68 Cornell. L. Rev. 760, 784-85 and 852 (1983); Kirkley, *Recent Developments in the Work-Product Doctrine and the Self-Critical Analysis Privilege*, Practicing Law Institute, Corporate Law and Practice Course Handbook series, 1178 PLI/Corp. 737 (May 2000); Chepiga, *Federal Attorney Client Privilege and Work-Product Doctrine*, Current Developments in Federal Civil Practice 1999, Practicing Law Institute, 601 PLI/Lit 591(1999). Yablon and Sparling, *United States v. Adlman: Protection for Corporate Work Product?*, 64 Brook. L. Rev. 627, 639-44 (1998).

E. The Circuits Are Divided, And Prompt Action By This Court Is Needed, On Whether To Recognize The Self-Critical Analysis Privilege.

The circuits are divided, and there is disarray among the district courts, on whether to recognize the self-critical analysis privilege, also called the "self-evaluative" privilege. As society has become more litigious and, at the same time, has become dependent on the safe use of complex technologies by large organizations, there is an urgent need for a nationwide recognition of the privilege. Only a prompt ruling by this Court can provide the certainty that is needed. In the absence of consistent, predictable application of the privilege, the preparation of candid, pro-active, written analyses intended to prevent accidents will continue to be chilled by uncertainty.[39]

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[38] In this case, even though the OPC was established by Kaiser's attorney in anticipation of regulatory and tort litigation, OPC documents, including legal analyses prepared by counsel in the belief they would be confidential, were ordered to be produced in discovery. Other counsel, in other cases, will draw a debilitating lesson from this case and other applications of the Fifth Circuit's law.

[39] A common law privilege develops as the courts recognize that a litigant's interest in disclosure is outweighed by the public interest in protecting confidentiality. *See e.g. Hickman v. Taylor*, 329 U.S. 495, 497 (1947). The self-critical analysis privilege has developed at common law, on a case-by-case basis, in the lower federal courts. Rule 501, of the Federal Rules of Evidence, "authorizes federal courts to define new privileges by interpreting 'common law principles in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (protecting notes of a clinical social worker).

The Fifth Circuit stated in this case that it "has not recognized the self-evaluation privilege." Very recently, the Ninth Circuit, citing the Fifth Circuit's opinion in this case, said that the Ninth Circuit also "has not recognized" a self-critical analysis privilege. *Union Pac. R.R. Co. v. Mauer*, 219 F.3d 1069, 1076 n.7 (9th Cir. 2000).

The Fifth Circuit's failure to recognize the privilege conflicts with a decision of the Sixth Circuit and with the D.C. Circuit's memorandum affirmance of the district court decision that first introduced the privilege in the federal courts. Other circuits appear not to have yet squarely addressed the issue, although the issue has been addressed by district courts in other circuits, with conflicting results.[40]

The privilege is a qualified privilege that can be overcome by a showing of need. The privilege is intended to serve the public interest "by encouraging self improvement through uninhibited self-analysis and evaluation."[41] The privilege is needed when "disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law."[42] *See* 6 Wm. James Moore et al., Moore's Federal Practice ¶ 26.48(2) (3d ed. 2000); Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1086 (1983); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423, 426 and n.1 (9th Cir. 1992).

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[40] A number of circuits have discussed the privilege but have found it unnecessary to decide the question in light of the facts of the particular case. *See, e.g. Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992); *See also* 6 James Wm. Moore et al., Moore's Federal Practice ¶26-48[2] (3d ed. 2000) and cases cited. For discussions of the conflicting treatment of the privilege in the federal courts, *see* Vandergrift, *The Privilege of Self Critical Analysis: A survey of the Law*, 60 Alb. L. Rev. 171 (1996), Lindsay and Solbakken, *Dispelling Suspicions as to the Existence of the Self-Evaluative Privilege*, 65 Brook. L. Rev. 459 (1999); Flanagan, *Rejecting a General Privilege for Self-Critical Analyses*, 51 Geo. Wash. L. Rev. 551 (1983); Hawks, *Environmental Self-Audit Privilege and Immunity: Aid to Enforcement or Pollution Protection*, 30 Ariz. St. L.J. 235 (1998); Leahy, *The Privilege for Self-Critical Analysis in Statutory and Common Law*, 7 Dick J. Envtl. L. & Pol'y. 49 (1998); O'Neil III and Charnes, *The Embryonic Self-Evaluative Privilege: A Primer for Health Care Lawyers*, 5 Annals HealthL. 33 (1996); Bacon, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 Kan. J.L. & Pub. Pol'y 221 (1999); Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 Harv. J. on Legis. 113 (1988).

The Ninth Circuit, in its frequently cited *Dowling* opinion, enunciated a four part test for determining whether the privilege applies (including whether the analysis is intended to be confidential, is of a type whose production would be chilled by forced disclosure, and is of a type the public has a strong interest in encouraging). However, the *Dowling* court found it unnecessary to decide, in that case, whether the privilege is recognized in the Ninth Circuit.

The privilege was first formulated and applied in the federal courts by the district court for the District of Columbia in a decision that was summarily affirmed by the D.C. Circuit. *Bredice v Doctors Hosp.*, Inc., 50 FRD 249 (D.D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973).

The privilege was applied by the Sixth Circuit, in *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 200 (1986). The Sixth Circuit protected from discovery by a union, in an administrative proceeding under the National Labor Relations Act, a company's analysis of an accident on the ground, among others, that "the practice of uninhibited self-critical analysis, which benefits . . . workers' safety and accident prevention, would undoubtedly be chilled by disclosure."

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[41] *In re Crazy Eddie Securities Litigation*, 792 F.Supp.197, 205 (E.D.N.Y. 1992)

[42] *Sheppard v. Consolidated Edison Co.*, 893 F.Supp. 6, 7 (E.D. N.Y. 1995) (internal quotation omitted).

Disputes about the existence and applicability of the privilege have been frequently addressed in the district courts in unreviewed opinions. In the absence of guidance from this Court and the courts of appeals, some district courts have been applying the privilege in a variety of circumstances, while others have said it does not exist.[43]

The self-critical analysis privilege has not yet been specifically addressed by this Court, although it has been suggested that the privilege may be derived from this Court's decision in *Upjohn Co. v U.S.*, 449 U.S. 383 (1981) (protecting, as "work product," a company's internal investigation and self-audit of "questionable payments").[44]

The purpose of the privilege is analogous to the purpose of the"deliberative process privilege," recognized by this Court ("to prevent injury to the quality of [government] agency decisions" and to avoid inhibiting frank discussions, in writing, of government policies).[45]

Application of the self-critical analysis privilege is a "significant source of discovery disputes" in federal courts.[46] The conflicting decisions, together with the lack of guidance from many of the courts of appeals, has left the district courts in disarray on this important issue. The disarray generates uncertainty, delay, forum shopping, and unnecessary controversy, as the issue is addressed time and again in conflicting, unappealed, interlocutory rulings. The uncertainty is debilitating for persons contemplating the preparation of self-critical analyses.

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[43] 6 Wm. James Moore et al., Moore's Federal Practice § 26.48 [2] (3d ed. 2000) (citing cases). According to Professor Moore, cases in which the privilege has been recognized and applied by the district courts have involved accounting records, securities, academic peer reviews, railroad accident investigations, product safety assessments, products liability, safety reports, and accident investigations.

[44] Basri, *Confidentiality of Communications*, Practicing Law Institute, 1178 PLI/Corp 305 (2000).

[45] *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150-51 (1975). *See* Kellogg, *What's Good for the Goose. . . Differential Treatment of the Deliberative Process and Self-Critical Analysis Privileges*, 52 Wash. U.J. Urb. & Contemp. L. 255 (1997).

[46] Michael C. Silberberg, *Waiver of Privilege*, 217 N.Y.L.J. 3 (1997).

More important, the uncertainty creates genuine danger for society. It is common knowledge, confirmed almost daily by the newspapers, that malfunctioning technology can be hazardous to workers, consumers, and the community at large. In large organizations, decisions are often made by committee, and executives with ultimate decision-making responsibility cannot be personally expert in the details of the technologies they oversee. Safe and effective operation of complex systems therefore depends on the free flow within organizations of candid, written, careful, self-critical analyses. Candor is discouraged, and the quality of analysis degraded, when organizations know that written self-critical analyses can be ammunition in the hands of litigation adversaries. Only prompt action by this Court can provide the nationwide certainty and clarification that is needed.

As stated below in the *amicus* brief of the National Association of Manufacturers, "unless this privilege is declared forthrightly . . ., many companies will continue to be discouraged from relying upon it, and the salutary effects of candid and thorough self-audits will be lost."

This case presents the opportunity for this Court to clarify, not only that the privilege indeed exists in the federal courts at common law, but also, contrary to the Fifth Circuit, that, to be useful for its intended purpose, it must apply (a) to documents sought by a government agency and (b) to self critical analyses performed before an accident occurs, as well as after.[47]

CONCLUSION

The writ of certiorari should be granted.

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[47] *See Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 364 (N.D. Ohio 1999) (applying privilege to "candid and open discussions" in "Pro-Active Safety Team" minutes).

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-31072

Filed, August 14, 2000

In Re: KAISER ALUMINUM and CHEMICAL COMPANY, July 5, 1999 explosion at KAISER ALUMINUM & CHEMICAL COMPANY, GRAMERCY WORKS FACILITY SUBPOENA DUCES TECUM; *et al*

Movants

In Re: KAISER ALUMINUM and CHEMICAL COMPANY, July 5, 1999 explosion at Kaiser Aluminum and Chemical Company, Gramercy Works Facility Subpoena Duces Tecum; TERRY DENOVA; SYLVESTER BATTISTE; KELLY DUFFY; BLACKIE LEBLANC; WILLIAM KIRSCH; DON PHILLIPS; GEORGE GUELFO; JOHN HALEY; RICHAD OSBORNE; WALTER BOUNDS; STEVEN BACALA; PETE JOHNSTON; ANTHONY VICKNAIR; GLEN LYNAGH; PATRICK HARRINGTON; BRIAN HATFIELD; WALTER HANSLEY; RUBEN COLE; KENNETH HYMEL; BRET HEBERT; SCOTT HALPHEN; JOSEPH KERRNAN; MARTY WUNSTEL; HOWARD ANDERSON

Movants - Appellants

DARRYL JACKSON; TERRY BROUILETTE; DON WILLIAMSON; BUD GARCIA; MATT MATTHEWS; SEYMOUR BROWN; WHIT CONWAY; FORREST BENGE; HERMAN FARLOUGH; DENNIS HAWES; ABE LOWE; DAVID STEELE; EARL VEAL

Appellants

v.

UNITED STATES DEPARTMENT of LABOR, Office of Mine Safety and Health

Movant - Appellee

Appeals from the United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 6/12/00, 5 Cir., ______, ______ F.3d ______)

Before REAVLEY, SMITH, and EMILIO M. GARZA, *Circuit Judges.*

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

(   ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

(   ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/______________________

United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-31072.

In Re: KAISER ALUMINUM AND CHEMICAL COMPANY, July 5, 1999 explosion at KAISER ALUMINUM & CHEMICAL COMPANY, GRAMERCY WORKS FACILITY SUBPOENA DUCES TECUM; *et al.*,

Movants,

In Re: KAISER ALUMINUM and CHEMICAL COMPANY, July 5, 1999 explosion at KAISER ALUMINUM & CHEMICAL COMPANY, GRAMERCY WORKS FACILITY SUBPOENA DUCES TECUM; TERRY DENOVA; SYLVESTER BATISTE; KELLY DUFFY; BLACKIE LEBLANC; WILLIAM KIRSCH; DON PHILLIPS; GEORGE GUELFO; JOHN HALEY; RICHARD OSBORNE; WALTER BOUNDS; STEVEN BACALA; PETE JOHNSTON; ANTHONY VICKNAIR; GLEN LYNAGH; PATRICK HARRINGTON, BRIAN HATFIELD; WALTER HANSLEY; RUBEN COLE; KENNETH HYMEL; BRET HEBERT; SCOTT HALPHEN; JOSEPH KERNAN; MARTY WUNSTEL; HOWARD ANDERSON,

Movants-Appellants,

DARRYL JACKSON; TERRY BROUILETTE; DON WILLIAMSON; BUD GARCIA; MATT MATTHEWS; SEYMOUR BROWN; WHIT CONWAY; FORREST BENGE; HERMAN FARLOUGH;DENNIS HAWES; ABE LOWE; DAVID STEELE; EARL VEAL,

Appellants,

v.

United States Department of Labor, Office of Mine Safety and Health,

Movant-Appellee.

June 12, 2000

Before REAVLEY, SMITH and EMILIO M. GARZA, *Circuit Judges.*

REAVLEY, Circuit Judge:

Appellants Kaiser Aluminum & Chemical Co. and several of its employees (collectively Kaiser) appeal a district court order enforcing subpoenas duces tecum issued by the Department of Labor's Mine Safety and Health Administration (MSHA). Kaiser argues that MSHA does not have jurisdiction over the Kaiser facility in issue, and that certain documents are privileged. We affirm.

BACKGROUND

Kaiser's Gramercy Works in Louisiana is a plant that processes bauxite into aluminum oxide, known as alumina. The alumina is sold to other concerns for smelting into aluminum ingots.

On July 5, 1999, there was an explosion which occurred in one of the digestion units at the plant and resulted in numerous injuries. MSHA began an investigation and decided to convene a public hearing. Under section 103(b) of the Federal Mine Safety and Health Act ("Mine Act" or "Act"), 30 U.S.C. § 813(b), MSHA may hold public hearings and issue subpoenas for the attendance of witnesses and the production of documents. The federal district courts have jurisdiction to issue orders enforcing MSHA subpoenas. *Id.*

Kaiser initiated the district court proceedings below by filing a motion to quash subpoenas issued by MSHA, claiming that they were overbroad. MSHA later sought to enforce certain subpoenas. Kaiser argued that MSHA did not have jurisdiction over its facility, and that certain documents were privileged under the attorney work product and "self-evaluation" privileges.

The district court required certain procedural safeguards for the benefit of Kaiser and its witnesses, but ruled that MSHA had jurisdiction over the facility. The district judge also agreed with a magistrate judge that certain pre-accident documents were not privileged, after both had reviewed the documents in camera.

DISCUSSION

A. District Court and Appellate Jurisdiction

This court sua sponte asked the parties to address appellate jurisdiction under the collateral order doctrine or another independent basis pursuant to 28 U.S.C. § 1291 or 1292. Upon further reflection and review of the record, we are satisfied that we have appellate jurisdiction under § 1291, which grants appellate jurisdiction over "all final decisions of the district courts." In general, a district court order is an appealable final decision if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States.*[1] We are persuaded that the district court entered a final order on October 1, 1999 disposing of the remaining matters before it, namely the manner and extent to which Kaiser must comply with the MSHA subpoenas. An order enforcing an administrative subpoena is considered a final order. *See United States v. Construction Products Research, Inc.*[2]

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[1] 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945).

[2] 73 F.3d 464, 469 (2d Cir.1996).

MSHA argues that while the district court ruled correctly, it should not have even addressed the scope of the Mine Act but instead should have summarily enforced the subpoenas.[3] MSHA claims that the district court exceeded its authority in entertaining Kaiser's challenge to MSHA's jurisdiction over the Kaiser plant.[4]

MSHA cites Fifth Circuit authority that district courts should handle agency subpoena requests "summarily and with dispatch," In re Office of Inspector General,[5] and that the district court should play a "strictly limited" role in such matters, *Sandsend Fin. Consultants, Ltd. v. FHLBB.*[6] However, we have also stated that courts will enforce an administrative subpoena if it "is within the agency's statutory authority" and other requirements are met. *United States v. Chevron U.S.A., Inc.*[7] In the circumstances presented, we conclude that the district court had authority to decide, as a matter of statutory construction in the face of essentially uncontested facts regarding the industrial activities at the plant, whether the plant is a facility engaged in mining-related activities within the scope of the Mine Act.

B. Jurisdiction of MSHA over the Plant

Kaiser argues that MSHA does not have jurisdiction over the Gramercy Works, and that instead the plant is subject to regulation by the Occupational Safety and Health Administration (OSHA). Section 4 of the Mine Act, 30 U.S.C. § 803, provides that each "coal or other mine" is subject to the provisions of the Act. "Coal or other mine" is defined under § 3(h)(1) of the Act to mean:

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[3] By extension of this argument, we assume that MSHA would have us summarily affirm the district court without reviewing the scope of the Mine Act.

[4] Kaiser and MSHA disagree on whether this argument was raised below. We assume without deciding that it was raised below.

[5] 933 F.2d 276, 277 (5th Cir.1991).

[6] 878 F.2d 875, 879 (5th Cir.1989).

[7] 186 F.3d 644, 647 (5th Cir.1999).

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment

30 U.S.C. § 802(h)(1) (emphasis added). We agree with the Sixth Circuit that this statute provides a "'sweeping definition' " for a mine, "encompassing much more than the usual meaning attributed to it." *Bush & Burchett, Inc. v. Reich.*[8]

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[8] 117 F.3d 932, 936 (6th Cir.1997) (quoting *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554 (D.C.Cir.1984)).

The district court, agreeing with MSHA, concluded that the activities at the Kaiser plant constitute "milling" under the Act. There is little dispute about the industrial activities occurring at the Gramercy Works. Aluminum is produced in several stages. Bauxite, a natural ore consisting of a mixture of several minerals, is collected through surface mining. The bauxite is then subjected to the Bayer process to produce alumina. The alumina can then be smelted to produce aluminum metal.

The intermediate stage of producing alumina through the Bayer process is carried out at Kaiser's plant. Raw bauxite is mined in Jamaica, where it is screened and dried to produce a bauxite concentrate. The screening removes limestone rocks from the bauxite. The concentrate is purchased by Kaiser and delivered to its plant.

The Bayer process consists of several steps including digestion, clarification, precipitation, and calcination. In digestion, the bauxite is mixed with sodium hydroxide (caustic soda) to create a slurry or "liquor," and the slurry is then combined under high heat and pressure with steam in large vessels called digesters or digestors. This process creates a sodium aluminate solution. The solution then undergoes clarification, during which it is run through pressure reducers and heat exchangers, a settling tank, and filters, followed by precipitation (cooling and settling), and calcination (a drying process) to produce alumina, the end product at the plant. The alumina is shipped elsewhere for smelting into aluminum metal.

The issue presented is whether the alumina production process employed at the plant constitutes "milling" under the Act. Milling is not defined in the statute; instead, under § 3(h)(1) quoted above, Congress expressly delegated to the Secretary of Labor authority to determine "what constitutes mineral milling for purposes" of the Act. We agree with the

District of Columbia Circuit that this language "gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference ... by ... the courts.... In this highly technical area deference to the Secretary's expertise is especially appropriate." Donovan, 734 F.2d at 1552 & n. 9.

When the language of a statute is unambiguous, we "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[9] In matters of statutory construction made by an agency entrusted to administer a statute, if Congress has not directly addressed the precise question at issue, the court should defer to the agency's interpretation as long as it is reasonable. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. at 844, 104 S.Ct. at 2782. An interpretation is reasonable so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

Kaiser is correct that the statute excludes liquid extraction of minerals unless the extraction takes place with workers underground. There is no underground extraction which takes place at the Gramercy Works. Instead alumina is "extracted" at a surface facility, using a chemical process involving liquid stages, as discussed above. But the statute by its terms covers a mine where the extraction of any nonliquid mineral, such as bauxite, takes place, as well as any facility where the milling and preparing of "such minerals" takes place. So the issue is whether the Bayer Process constitutes "milling" of solid bauxite ore.

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[9] 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984).

Kaiser argues that, unlike other alumina companies, it does no crushing of bauxite at its plant. Webster's Dictionary explains that the origin of the word "mill" goes back to the Latin "mola" for mill or millstone. The first definition is "a building provided with machinery for grinding grain into flour." "Mill" can also mean "a machine for crushing or comminuting some substance," and "to crush or grind (ore) in a mill."[10] Kaiser also cites a dictionary of mining and mineral terms, published by the American Geological Institute, defining a mill as a "plant in which crushing, wet grinding, and further treatment of ore is conducted," and "a place or a machine in which ore or rock is crushed."[11] Under these definitions, the Bayer process of alumina production does not much sound like milling.

Kaiser insists that the liquid-based alumina extraction process, i.e. the Bayer process, is "refining," not "milling," and that refining facilities are regulated by OSHA. Kaiser cites various published materials referring to the Bayer process as a "refining" process. Under a 1979 Interagency Agreement between OSHA and MSHA, and a 1974 Memorandum of Understanding between OSHA and the Mining Enforcement and Safety Administration (the predecessor to MSHA), "refining" falls within OSHA's jurisdiction, since by the terms of these agreements refining "[c]ommences at the point where milling, as defined, is completed, and material enters the sequential processes to produce a product of higher purity."[12]

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[10] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1434 (Phillip B. Gove ed., 1968).

[11] AMERICAN GEOLOGICAL INST., DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 344 (2d ed.1996).

Despite these arguments, we cannot say that MSHA's statutory interpretation of milling is unreasonable under Chevron. At the outset, we note that the Interagency Agreement expressly includes alumina plants within the jurisdiction of MSHA. Despite some general language ceding regulation of "refining" to OSHA, the Agreement could not be more clear that "[p]ursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling ... MSHA jurisdiction includes ... alumina and cement plants."[13]

MSHA cites a dictionary of mining and mineral terms published by the U.S. Department of Interior which gives a definition of mill as any facility that reduces ores by means other than smelting.[14] MSHA also cites the dictionary of mining and mineral terms published by the American Geological Institute, discussed above, which again includes a definition of mill as any facility for reducing ores by means other than smelting, as well as a definition as a facility where "metal ore is cleaned, concentrated, or otherwise processed before it is shipped to the customer, refiner, smelter, or manufacturer."[15] A facility employing the Bayer process falls under these definitions, since this process does not involve smelting, and the end product, alumina, must be sent to a smelter to produce aluminum metal.

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[12] Interagency Agreement, 44 Fed.Reg. 22,827, 22,830 (1979); Memorandum of Understanding Between MESA and OSHA, 39 Fed.Reg. 27,384, 27,384 (1974).

[13] Interagency Agreement, at 22,827.

[14] U.S. DEPT. OF THE INTERIOR, A DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 706 (Paul W. Thrush & Staff of the Bureau of Mines eds., 1968).

[15] AMERICAN GEOLOGICAL INST., DICTIONARY OF MINING, MINERAL, AND RELATED TERMS 344 (2d ed.1996).

Kaiser suggests that "milling" under the statute applies to physical processes only, and that the Bayer process is a chemical process whereby the chemical composition of the mineral is altered. The statute by its terms does not exclude chemical processes. MSHA cites legislative history of the Mine Act from a senate report that "it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possible interpretation," and "that doubts be resolved in favor of inclusion of a facility within the coverage of the Act."[16] A house report cites dangers associated with mining to include poisonings caused by "milling operations where the ore is liquified and then vaporized and condensed," and the "chemical processing of ores."[17]

Kaiser argues that *Herman v. Associated Elec. Coop., Inc.*[18] is "dispositive." In Herman, the defendant operated an electric utility plant. It purchased crushed coal for its plant from two mines, and at the plant removed debris and further crushed the coal for burning in its generator units. The court held that the facility was not a mine under the Mine Act. The court reasoned that "[t]he Act was designed primarily to protect miners, not employees of coal purchasers such as electric utilities and steel mills," id. at 1082, and that the utility "purchased coal that was processed into a marketable form by the mine," id. at 1083. We do not entirely agree with the majority opinion of the Eighth Circuit in Herman and distinguish the facts from our present case because the electric utility there was not in the business of selling a raw or processed mineral product. An electric utility sells electricity. The coal was used as an end product at the plant, and hence the utility was the final consumer of the coal. In contrast, Kaiser is in the business of processing, or as MSHA claims, "milling," a mineral product for sale to others. Herman did not address whether the electric utility engaged in milling under the statute.

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[16] S.Rep. No. 95-181, at 14 (1977), reprinted in 1977 U.S.C.C.A.N. 3401, 3414.

[17] H.R.Rep. No. 95-312, at 10-11 (1977), reprinted in SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON HUMAN RESOURCES, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 366, 368-69 (1978).

[18] 172 F.3d 1078 (8th Cir.1999).

C. Privilege Issue

Kaiser claims that certain documents of the "Overpressure Protection Committee" were privileged, and that the district court misapplied the legal standards applicable to the privilege issue. This committee was formed by Kaiser in the late 1970's to study the existing pressure vessels used at the Gramercy Works, and determine how procedures could be improved and liability minimized. It is unclear from the record and briefs whether the documents in issue were prepared by the committee itself or were prepared by others and presented to the committee for its review. The documents in issue are not a part of the appellate record.

Both the magistrate judge and the district judge reviewed the documents in camera, and ordered the disclosure of certain documents that were prepared before the accident. Kaiser claims that the documents were privileged under the work product and "self-evaluation" privileges.

The work product privilege applies to documents "prepared in anticipation of litigation." Fed.R.Civ.P. 26(b)(3). The law of our circuit is that the privilege can apply where litigation is not imminent, "as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *United States v. El Paso Co.*[19] Kaiser argues that the district court erred in applying this "primary purpose" test. The court correctly followed Fifth Circuit precedent.

As for the self-evaluation privilege,[20] Fed.R.Evid. 501 states that privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon.*[21] The Fifth Circuit has not recognized the self-evaluation privilege, and "courts with apparent uniformity have refused its application where, as here, the documents in question have been sought by a governmental agency." *FTC v. TRW, Inc.*[22] The Ninth Circuit, in rejecting application of the privilege, also noted that "the difference between pre-accident safety reviews and post-accident investigations is an important one." *Dowling v. American* Hawaii Cruises, Inc.[23] We need not decide whether a self-evaluation privilege should ever be recognized. We decline to recognize such a privilege in the circumstances presented, namely a case where a government agency seeks pre-accident documents.

AFFIRMED.

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[19] 682 F.2d 530, 542 (5th Cir.1982) (quoting United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. Unit A 1981)).

[20] The self-evaluation privilege is also known as the "self-critical analysis" privilege and the "self-evaluative" privilege.

[21] 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974).

[22] 628 F.2d 207, 210 (D.C.Cir.1980).

[23] 971 F.2d 423, 427 (9th Cir.1992).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: JULY 5, 1999 EXPLOSION AT KAISER
ALUMINUM & CHEMICAL COMPANY

MISC. ACTION

NO: 99-2641

SECTION: "J" (3)

ORDER

This matter came on for hearing on September 30, 1999 at 2:00 p.m. At the hearing, the Court entertained oral argument on the various motions pending before the Court, and ruled as follows:

(1) the Kaiser Aluminum and Chemical Company ("Kaiser") Employees' Motion for Finding that MSHA Lacks Jurisdiction (Rec. Doc. ___) in which Kaiser joined (Rec. Doc. 35) was DENIED for reasons given orally on the record;

New Orleans, Louisiana, this 1st day of October, 1999.

/s/ ____________________________

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: JULY 5, 1999 EXPLOSION AT KAISER ALUMINUM & CHEMICAL COMPANY

MISC. ACTION

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New Orleans, Louisiana, this 1st day of October, 1999.

/s/ ________________________________

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT OF LOUISIANA

IN RE: July 5, 1999 EXPLOSION AT KAISER ALUMINUM & CHEMICAL COMPANY

MISC NUMBER: 99-2641

SECTION "J"

TRANSCRIPT OF PROCEEDINGS HEARD BEFORE
THE HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

PROCEEDINGS

(THURSDAY, SEPTEMBER 30, 1999)

* * *

[p. 50]

MR. SAVIT: If I might point out, the government's papers admit that their definition of milling goes beyond what anybody traditionally thinks of as milling. It says right on page 6 of their brief –

THE COURT: I agree with that. I don't think there's any question about that. This is not the typical mining operation that an average lay person would think of as a mine. There is no doubt about that.

[p. 68]

THE COURT: Okay. As I said, I'm essentially viewing this motion by Kaiser and certain of its employees on the jurisdictional issue as a motion to dismiss this proceeding based on lack of subject matter jurisdiction and/or a—well, I'll consider it in that vain. Even though it's not styled in that way.

But for a number of reasons, some of which I've already discussed and implied in my questioning and responses with counsel, the Court finds that the Secretary through its agency, the Mine Safety Health Administration or MSHA, does have jurisdiction over the Kaiser plant at Gramercy.

I reached that conclusion on several grounds, first of which is the plain words or plain language of the statute which describes or references not only extraction of minerals from the ground, which would be the classical definition of mining, but it goes beyond that, it talks about milling, the milling process and the preparation of minerals after they are extracted from the ground and all of the land based facilities and so forth that go along with that process, which I think covers the type of process that goes on at the Kaiser facility in Gramercy.

The Act does not define, it has some definitions in it but it doesn't define all of the terms. For example, it doesn't define milling, what is meant by the process of milling. The statute does, however, as Judge Robert Bork pointed out in the case of *Donovan v. Carolina Stalite Company* decision of the D.C. Circuit Court of Appeals, 1984, 734 F.2d 1547.

In that case, Judge Bork pointed out that the statute gives the Secretary discretion within reason to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference by both the commission and the courts. And in a footnote to that statement Judge Bork goes on to say that in this highly technical area that is in defining what is milling and what is mining and so forth, deference to the Secretary's expertise is especially appropriate.

And for the same reason in that decision the Court of Appeals went on to say that the Commission on that case which had found a lack of jurisdiction by MSHA was wrong when they concluded that the interagency agreements in memorandum of understanding between the Secretary of Labor's two agencies, MSHA on the one hand and OSHA on the other hand, was irrelevant or shouldn't be given any great weight.

And, in fact, the Court of Appeals said, these documents, while not dispositive, assist our resolution of the jurisdictional question. Section 3 (H) of the act specifically contemplates and depends in part on the "the agencies agreeing between themselves as to which agency will inspect the particular business establishment." That's the language from the Act.

The court went on to say that the language alone compels us to consider the Secretary's determination of the Act's jurisdictional scope as expressed in these agreements.

Then the court noted that in looking at that document, that interagency agreement between OSHA and MSHA from 1979, I think the original was '77 and then there was a revision in '79.

The court said: "We find relevant the agreements list of milling processes which MSHA has authority to regulate."

And it describes a listing of the processes that would be considered milling, which had not been defined in the act but was not being defined by the agreement between MSHA and OSHA. And it consisted of one more of the following processes: Crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury) leaching and briqueting.

The Court in that case also pointed out, as I said earlier, that the Act itself was intended to be very expansive, very broadly interpreted, and as I said, in fact, directed the Secretary of Labor to define what is milling and what is mining and to further define that to the extent there is any ambiguity in the Act itself, and to work that out between MSHA and OSHA.

And that is, in fact, exactly what occurred in the interagency agreement in this case. If there was any doubt as to whether the alumina process, the Bayer alumina process that goes on at Kaiser, was, in fact, milling it was removed in the 1979 agreement when they expressly said that MSHA to the exclusion of OSHA will have jurisdiction over the alumina plants. And that is, in fact, what has occurred historically since then.

There's no doubt that an average lay person would not consider the Gramercy Kaiser plant to be a mine in the classical or traditional sense; however, as I've already pointed out, the courts have said that that's not the test. The test is how a mine is defined in this particular act or statute.

In fact, in another case out of the Third Circuit, in *Marshall v. Stoudt's Ferry*, at 602 F.2d 589. The Third Circuit Court of Appeals said that although it maybe in Congress to apply the label mine to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word mine is much more encompassing than the usual meaning attributed to it. In other words, the word means what the statute says it means.

And then there's an interesting footnote that follows that. It says that the law should attribute expansive and sometimes even bizarre meaning to a word is not a novel phenomenon.

And then again, if there is any doubt as to the intention of Congress I think it's cleared up by the language from the Congressional record which points out that Congress intended that what is to be considered a mine and to be regulated under this act is to be given the broadest possible interpretation and that doubts were be resolved in favor of inclusion of a facility within the coverage of the act.

So for all of those reasons, I'm denying the motion of Kaiser and certain of its employees regarding the jurisdictional issue.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: July 5, 1999 EXPLOSION at KAISER ALUMINUM & CHEMICAL COMPANY

MISC. ACTION

NO: 99-2641

SECTION: "J"(3)

ORDER

Kaiser Aluminum & Chemical Company's ("Kaiser's") **Motion for Review of Magistrate Judge Africk's Order** of September 10, 1999 (Rec. Doc. 22) came on for hearing on Friday, September 17, 1999. In its motion, Kaiser seeks review of Magistrate Judge Africk's order of September 10, 1999, denying a protective order to shield certain documents which Kaiser claims are privileged, either by the work product privilege or the self-critical analysis privilege. The Court entertained arguments of counsel and took the matter under advisement so that the Court could review, *in camera*, the documents in question.

Having now received and reviewed those documents, as well as considering the record, the memoranda and argument of counsel, and applicable law, the Court finds that the Magistrate Judge's ruling is neither clearly erroneous nor contrary to law. Fed. R. Civ. P. 72. Accordingly, IT IS ORDERED that Magistrate Judge Africk's order of September 10, 1999, should be and is hereby AFFIRMED.

New Orleans, Louisiana, this 17th day of September, 1999.

/s/______________________________

United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

No. MISC. NO. 99-2641

In Re: July 5, 1999, EXPLOSION at KAISER ALUMINUM & CHEMICAL COMPANY, GRAMERCY WORKS FACILITY, SUBPOENA DUCES TECUM

Sept. 13, 1999

AFRICK, Magistrate J.

Before the Court is an expedited motion by Kaiser Aluminum & Chemical Company (Kaiser) and Mr. Terry Denova[1] to quash subpoenas. The remaining issue pending before this Court is whether certain documents, generated between November 7, 1979 and July 5, 1995, and provided by Kaiser to this Court for an in camera review, are shielded from discovery based upon the work product privilege and/or the self-critical analysis privilege.[2]

By way of background, on July 5, 1999, during the early morning hours, an explosion occurred at Kaiser's plant in Convent, Louisiana. According to the U.S. Department of Labor, it appears that an internal pressure buildup in certain flash tanks caused one or more of the tanks to explode.

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[1] Mr. Denova is a supervisor at the Kaiser plant located in Convent, Louisiana.

[2] The self-critical analysis privilege is also known as the self-evaluative privilege.

Pursuant to the Federal Mine Safety and Health Act, the U.S. Department of Labor is currently conducting public hearings with respect to said explosion. As part of its investigation, the Labor Department has subpoenaed various witnesses and documents.

Kaiser first claims that such documents are shielded from discovery by the work product privilege. Rule 26(b)(3) of the Federal Rules of Civil Procedure states in pertinent part:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The work product doctrine shields the mental processes of an attorney as well as an agent acting at an attorney's direction in creating the documents. In re: Grand Jury (Impounded), 138 F.3d 978, 981 (3rd Cir.1998). Such a privilege promotes our adversarial system of justice by protecting confidential documents prepared by the attorneys or their agents in anticipation of litigation and it also allows the attorneys to prepare cases without worrying that their work product will be somehow used against their clients. *Id.*

The Court has reviewed the in camera documents and rejects the assertion of the work product privilege in this case. In order to claim such a privilege, litigation need not necessarily be imminent. *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.), cert. denied, 454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 162 (1981). However, the primary motivating purpose behind the creation of the documents must be to aid in possible future litigation. *Id*; *see* also *Louisiana Environmental Action Network, Inc. v. Evans Industries, Inc.*, 1996 WL 325588 (E.D.La.1996). Excluded from work product materials are documents which have been assembled in the ordinary course of business or those documents assembled pursuant to public requests which are unrelated to litigation. *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir.1982), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1927, 80 L.Ed.2d 473 (1984).

The burden of establishing that a document is protected by the work product doctrine is on the party who asserts the claim. Hodges, *Grant & Kaufmann v. United States Government, et al*, 768 F.2d 719, 721 (5th Cir.1985). Kaiser has not satisfied its burden of demonstrating that the primary motivating purpose behind the creation of the in camera documents was to aid in possible future litigation.

According to Kaiser's own in camera document, the "primary purpose" of its system review was to evaluate safety as well as regulatory and legal implications.[3] A review of the documents warrants a conclusion that Kaiser was, in part, concerned whether the proposal under review would favor its legal position pursuant to principles of general tort law.[4] However, it is readily apparent that many of the documents were generated because of safety, rather than litigation, issues. Accordingly, the assertion of a work product privilege with respect to the in camera documents is without merit.

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[3] Document Nos. DIG 024457 and DIG 024460-61.

Kaiser's assertion of the self-critical analysis (also known as self-evaluative) privilege is likewise rejected. Such a privilege is largely undefined and courts have been reluctant to recognize or enforce the same. See Federal Trade Commission v. TRW, Inc., 628 F.2d 207, 210 (D.C.Cir.1980); *see* also *Myers v. Uniroyal Chemical Co.*, Inc., 1992 WL 97822 (E.D.Pa.). As noted in Myers, the "privilege 'is based upon the concern that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law or with professional standards." ' Myers, at *1 (quoting Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y.1987)).

In cases where federal law governs, privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Rule 501 of the Federal Rules of Evidence. United States courts have the flexibility to develop privilege rules on a case by case basis. *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189, 110 S .Ct. 577, 582, 107 L.Ed.2d 571 (1990). Courts will not "create and apply an evidentiary privilege unless it 'promotes sufficiently important interests to outweigh the need for probative evidence ..." ' *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980)). Privileges contravene the fundamental principle that our citizens have "a right to every person's evidence." *Id.* (Quotations omitted.)

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[4] Document No. DIG 024458.

Courts have refused the application of the self-critical analysis privilege, to the extent it exists, when documents have been sought by a government agency. *Federal Trade Commission v. GRW, Inc.*, 628 F.2d at 210. In this case, the Court notes that the documents reviewed in camera were produced in the normal course of business and voluntarily prepared as opposed to being prepared for submission to the government. *See Roberts v. Carrier Corp.*, 107 F.R.D. 678, 684 (N.D. Indiana 1985); *see* also *Louisiana Environmental Action Network, Inc. v. Evans Industries, Inc.*, at *3.

The Fifth Circuit has not yet embraced such a privilege. In Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423 (9th Cir.1992), on remand on other grounds, 1993 WL 558787 (D.Hawaii), the Ninth Circuit, in a scholarly opinion, considered this so-called privilege. The Ninth Circuit recognized, as does this Court, that "the difference between pre-accident safety reviews and post-accident investigations is an important one." *Id.* at 427. "The candid analysis of the causes of accidents is more likely to be stifled by a disclosure requirement than would the routine review of safety concerns." *Id.* The Dowling Court concluded that voluntary and routine pre-accident safety reviews were not protected by a privilege of self-critical analysis. The in camera documents reviewed by this Court are, although not identical to pre-accident safety reviews, comparable in nature.

Kaiser has an incentive to avoid lawsuits resulting from unsafe conditions and it does not want a reputation for having an unsafe plant. Nothing stated on the documents reviewed specifically indicates that the documents were to remain confidential, although admittedly, this may have been expected. It is not unfair to require that such documents be disclosed after they were voluntarily prepared. Citizens living in the vicinity of the plant have a compelling interest in knowing what steps Kaiser believes could be taken to improve the safety of the plant and protect the safety and well-being of the community. Kaiser's incentive to continue such self-evaluation, especially with respect to safety concerns, is outweighed by the alleged harm that might result if the documents were not disclosed.

Accordingly, even if this Court were bound by Fifth Circuit precedent to acknowledge such a privilege, which is not the case, this Court would reject such an assertion in this case. Furthermore, were this Court to balance the factors considered by other courts in other circuits with respect to such alleged privilege, the balance would be struck, for the reasons assigned, in favor of disclosure.[5]

IT IS THEREFORE ORDERED that such documents BE DISCLOSED.

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[5] In Dowling, the Ninth Circuit stated:

> This circuit has not yet considered whether there exists a so-called privilege of self-critical analysis, but other courts have generally required that the party asserting the privilege demonstrate that the material to be protected satisfies at least three criteria: "first, the information must result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed." Note, The Privilege of Self-Critical Analysis, 96 Harv.L.Rev. 1083, 1086 (1983). To these requirements should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential.

Dowling, 971 F.2d at 425-426. (Footnote omitted)

APPENDIX G

Mine Safety and Health Administration

Occupational Safety and Health Administration

Interagency Agreement—[40 Fed. Reg. 22,827-22,830 (1979).]

The Mine Safety and Health Administration (MSHA), U.S. Department of Labor, and the Occupational Safety and Health Administration (OSHA), U,S. Department of Labor, have entered into this agreement to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide for coordination between MSHA and OSHA in all areas of mutual interest.

A. Authority and Principle

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 91-173 as amended by Pub. L. 95-164 (Mine Act), authorizes the Secretary of Labor to promulgate and enforce safety and health standards regarding working conditions of employees engaged in underground and surface mineral extraction (mining), related operations, and preparation and milling of the minerals extracted.

2. The Occupational Safety and Health Act of 1970 (OSH Act) gives the Secretary of Labor authority over all working conditions of employees engaged in business affecting commerce except those conditions with respect to which other Federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health. The OSH Act also provides that States may operate their own occupational safety and health programs under a plan approved by the Secretary.

3. This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved. The general principle is that as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions. However, where the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals on mine sites) or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSH Act will be applied to those working conditions. Also, if an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSH Act may be applied to such an employer where the application of the OSH Act would, in such a case, provide a more effective remedy than citing as a mine operator or an independent contractor subject to the Mine Act who does not, in such circumstances, have direct control over the working conditions.

B. Clarification of Authority

1. Section 4 of the Mine Act gives MSHA jurisdiction over each coal or other mine and each operator of such mine. Section 3(d) defines "operator" and includes in that definition independent contractors performing construction at mines.

2. Section 3(h)(1) of the Mine Act gives MSHA jurisdiction over lands, structures, facilities, equipment, and other property used in, to be used in, or resulting from

mineral extraction or used in or to be used in mineral milling. This includes the authority to regulate the construction of such facilities, structures and other property. Further, Section 3(h)(1) directs the Secretary of Labor, in making a determination of what constitutes mineral milling, to give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

3. Appendix A provides more detailed descriptions of the kinds of operations included in mining and milling and the kinds of ancillary operations over which OSHA has authority. Notwithstanding the clarification of authority provided by Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle.

4. Under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling. Or, the term milling may be narrowed to exclude from the scope of the term processes listed in Appendix A where such processes are unrelated, technologically, or geographically, to mineral milling. Determinations shall be made by agreements between MSHA and OSHA.

5. The following factors, among others, shall be considered in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the

safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

6. Pursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling considering convenience of administration, the following jurisdictional determinations are made:

a. MSHA jurisdiction includes salt processing facilities on mine property: electrolytic plants where the plants are an integral part of milling operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and cement plants.

b. OSHA jurisdiction includes the following, whether or not located on mine property: brick, clay pipe and refractory plants: ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and hot mix plants; smelters and refineries. OSHA jurisdiction also includes salt and cement distribution terminals not located on mine property, and milling operations associated with gypsum board plants not located on mine property.

7. "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining (For example, a borrow pit used to build a road or contrast a surface facility on mine property is subject to MSHA jurisdiction). "Borrow pit" means an area of land where the overburden, consisting of unconsolidated, rock, glacial debris. Or other earth material overlaying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is

extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

8. When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator or OSHA State Designee in those States with approved plans shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy. Jurisdictional questions that can not be decided at the local level shall be promptly transmitted to the respective National Offices which will attempt to resolve the matter. If unresolved, the matter shall be referred to the Secretary of Labor for decision.

* * *

Dated: March 29, 1979.

Mine Safety and Health Administration

Robert B. Lagather,
Assistant Secretary for Mine Safety and Health.

Dated: March 29, 1979.

Occupational Safety and Health Administration

Eula Bingham,
Assistant Secretary of Labor for Occupational Safety and Health.

Approved dated: March 29, 1979.
Ray Marshall,
Secretary of Labor

Appendix A

Definitions

"Coal or other mine" is defined in the Mine Act as:

"(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and railings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities."

"Miner" is defined in the,Mine Act as:

"Any individual working in a coal or other mine."

"Operator" is defined in the Mine Act as:

"Any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

"Mining and Milling":

Mining has been defined as the science, technique, and business of mineral discovery and exploitation. It entails such work as directed to the severance of minerals from the natural deposits by methods of underground excavations, opencast work, quarrying, hydraulicking and alluvial dredging. Minerals so excavated usually require upgrading processes to effect a separation of the valuable minerals from the gangue constituents of the material mined. This latter process is usually termed "milling" and is made up of numerous procedures which are accomplished with and through many types of equipment and techniques.

Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

A *Crude* is any mixture of minerals in the form in which it occurs in the earth's crust. An ORE is a solid crude containing valuable constituents in such amounts as to constitute a promise of possible profit in extraction, treatment and sale. The valuable constituents of an ore are ordinarily celled *valuable minerals,* or often just *minerals; the* associated worthless material is called *gangue.*

In some ores the mineral is in the chemical state in which it is desired by primary consumers, e.g., graphite, sulphur, asbestos, talc, garnet. In fact, this is true of the majority of nonmetallic minerals. In metallic ores, however, the valuable minerals in their natural state are rarely the product desired by the consumer, and chemical treatment of such minerals is a necessary step in the process of beneficiation. The end products are usually the result of concentration by the methods of ore dressing (milling) followed by further concentration through metallurgical processes. The valuable produce of the oredressing treatment is called *Concentrate;* the discarded waste is *Tailing.*[*]

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[*] Preface. p.v., Handbood of Mineral Dressing. Authur P. Taggart. Second Printing. march 1947. John Wiley and Sons, Inc.

Specific Examples of MSHA Authority

Mining—MSHA

Following is a list indicating mining operations and minerals for which MSHA has authority to regulate.

Mining Operations

Underground mining.

Open pit mining.

Quarrying.

Solution mining (Precipitate & Leaching).

Dredging (When the primary purpose of the dredging operation is to recover metal or nonmetallic minerals for milling and/or sale or use).

Hydraulicking.

Ponds—brine evaporation.

Auger Mining.

Minerals

Coal

Metals

(Included but not limited to) Alumina, antimony, bauxite, beryl, bismuth, chrome, cobalt, copper, gold, iron. lead, manganese, mercury, molybdenum, nickel, rare earths, silver, titanium, tungsten, uranium, vanadium, zinc, zirconium.

Nonmetals

(Included but not limited to)

Abrasives, aplite, asbestos, barite, baron, bromine, calcium chloride, clay, mica, mineral pigments, oil shale, peat, perlite, potash, pumice, potash rock, diatomite, feldspar, fluorspar, gilsonite, graphite, gypsum, kyanite, magnesite, salt. shale, sodium compounds, sulfur, talc, soapstone, and pyrophyllite, vermiculite, wollastonite.

Subgroups of Nonmetals

(Sand and Gravel, and Crushed and Dimension Stone Industries)

Sand, Gravel, Cement, Gabbro, Gneiss, Lime, Limestone, Marble, Native Asphalt (impregnated stone & sand), Quartizite, Schist, Slate, Taprock or Diabasa.

Milling—MSHA Authority

Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to Paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing. sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.

Crushing

Crushing is the process used to reduce the size of mined materials into smaller, relatively coarse particles. Crushing may be done in one or more stages, usually preparatory for the sequential stage of grinding, when concentration of ore is involved.

Grinding

Grinding is the process of reducing the size of a mined product into relatively fine particles.

Pulverizing

Pulverizing is the process whereby mined products are reduced to fine particles, such as to dust or powder size.

Sizing

Sizing is the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes.

Concentrating

Concentrating is the process of separating and accumulating economic minerals from gangue, or the upgrading of ore or minerals.

Washing

Washing is the process of cleaning mineral products by the buoyant action of flowing water.

Drying

Drying is the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment.

Roasting

Roasting is the process of applying heat to mineral products to change their physical or chemical qualities for the purpose of improving their amenability to other milling processes.

Pelletizing

Pelletizing is the process in which finely divided material is rolled in a drum, cone, or on an inclined disk so that the particles cling together and roll up into small spherical pellets. This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Sintering

Sintering is the process of agglomerating small particles to form larger particles, cakes or masses, usually by bringing together constituents through the application of heat at temperatures below the melting point.

This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Evaporating

Evaporating is the process of upgrading or concentrating soluble salts from naturally occurring, or other brines, by causing uncombined water to be removed by application of solar or other heat.

Calcining

Calcining is the process of applying heat to mineral materials to upgrade them by driving off volatile chemically combined components and affecting physical changes.

This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling processes.

Kiln Treatment

Kiln Treatment is the process of roasting, calcining, drying, evaporating, and otherwise upgrading mineral products through the application of heat.

This process is applicable to milling only when accomplished in relation to, and as an integral part of, other milling process.

Sawing and Cutting Stone

Sawing and cutting stone is the process of reducing quarried stone to smaller sizes at the quarry site when the sawing and cutting is not associated with polishing or finishing.

Heat Expansion

Heat expansion is a process for upgrading material by sudden heating of the substance in a rotary kiln or sinter hearth to cause the material to bloat or expand to produce a lighter material per unit of volume.

Retorting

Retorting is a process usually performed at certain mine sites, and is accomplished by heating the crushed material in a closed retort to volatilize the metal, material or hydrocarbon which is then condensed and recovered as upgraded metal, material or hydrocarbon.

Leaching

Leaching is the process by which a soluble metallic compound is removed from a mineral by selectively dissolving it in a suitable solvent, such as water, sulfuric acid, hydrocholoric acid, cyanide, or other solvent. to make the compound amenable to further milling processes.

Briquetting

Briquetting is a process by which iron ore, or other pulverized mineral commodities, are bound together into briquettes, under pressure, with or without a binding agent, and thus made conveniently available for further processing.

MSHA Authority Ends—OSHA Authority Begins

Subject to Paragraph B.5. of the Agreement, the following are types of operations which may be on or contiguous to mining and/or milling operations listed above, over which MSHA does not have authority to prescribe and enforce employee safety and health standards, and over which OSHA has full authority, under the Act, to prescribe and enforce safety and health standards regarding working conditions of employees.

OSHA regulatory authority commences as indicated in the following types of operations:

Gypsum Board Plant

If the plant is located on mine property, commences at the point when milling, as defined, is completed, and the gypsum and other materials are combined to enter the sequential processes necessary to produce gypsum board. If not located on mine property, OSHA has authority over entire plant.

Brick, Clay Pipe and Refractory Plants

Commences after arrival of raw materials at the plant stockpile.

Ceramic Plant

Commences after arrival of the clay and other additives at the plant stockpile.

Fertilizer Products

Commences at the point when milling, as defined, is completed, and two or more raw materials are combined to produce another product. Note that a "kiln", as it relates to these products for roasting and drying, is considered to be within the scope of the milling definition.

Asphalt-Mixing Plant

Commences after arrival of sand and gravel or aggregate at the plant stockpile.

Concrete Ready-Mix or Batch Plants

Commences after arrival of sand and gravel aggregate at the plant stockpile.

Custom Stone Finishing

Commences at the point when milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product and includes sawing and cutting when associated with polishing and finishing.

Smelting

Commences at the point where milling, as defined, is completed, and metallic ores or concentrates are blended with other materials and are thermally processed to produce metal.

Electrowinning

Commences at the point where milling, as defined, is completed, and metals are recovered by means of electrochemical processes.

Salt and cement distribution terminals not located on mine property.

Refining

Commences at the point where milling, as defined, is completed, and material enters the sequential processes to produce a product of higher purity.

[FR Doc. 79--11930 Filed 4-16-79; 8:45 am]

APPPENDIX H

CONSTITUTION AND STATUTES

U.S. Constitution, Article I

All legislative powers herein granted shall be vested in a Congress of the United States.

Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq*

Section 2(g), 30 U.S.C. § 801(g

Congress finds and declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this Act (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health, Education and Welfare and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

Section 3(h)(1), 30 U.S.C. § 802(h)(1

"Coal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, *facilities*, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form, with workers underground, or used in, or to be *used in, the milling of such minerals*, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. *In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary [of Labor] shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.* [Emphasis supplied.]

Section 3(g), 30 U.S.C. § 802(g)

Miner means any individual working in a coal or other mine.

Section 4, 30 U.S.C. § 803

Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

Section 103(b), 30 U.S.C. § 813 (b)

For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths . . . . In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Section 110, 30 U.S.C. § 820

(a) The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Any operator who fails to correct a violation for which a citation has been issued under section 104(a) within the period permitted for its correction may be assessed a civil penalty of not more than $1,000 for each day during which such failure or violation continues.

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

(d) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a) or section 105(c), shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both. . . . .

(f) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(g) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

Federal Rule of Civil Procedure 26(b)(3

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Federal Rule of Evidence 501

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

(2)

Supreme Court, U.S.
FILED
JAN 4 2001
CLERK

No. 00-770

IN THE

Supreme Court of the United States

KAISER ALUMINUM AND CHEMICAL CORPORATION,
Petitioner,
v.
UNITED STATES DEPARTMENT OF LABOR, MINE
SAFETY AND HEALTH ADMINISTRATION,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

SUPPLEMENTAL BRIEF OF KAISER ALUMINUM AND CHEMICAL CORPORATION ON PETITION FOR WRIT OF CERTIORARI

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17 pp

On November 13, 2000, Kaiser Aluminum and Chemical Corporation filed in this docket its Petition for Writ of Certiorari ("Petition") to the United States Court of Appeals for the Fifth Circuit.

Kaiser now makes this supplemental filing, pursuant to the Court's Rule 15(8), for the sole purpose of advising the Court of a settlement of related issues ('Settlement") between Kaiser and the Mine Safety and Health Administration of the United States Department of Labor ("MSHA"). The Settlement, which reserves and does not address the issues raised in Kaiser's Petition, was approved by an administrative law judge of the Federal Mine Safety and Health Review Commission on December 13, 2000. The terms of the settlement are set out in full in the Secretary of Labor's Revised Motion to Approve Settlement and Motion to Dismiss, dated December 8, 2000, filed with the Federal Mine Safety and Health Review Commission (attached hereto in the Appendix).

The information contained in Kaiser's original Corporate Disclosure Statement is unchanged.

Background

As stated in Kaiser's Petition, this case was begun in the district court when Kaiser and certain Kaiser employees challenged the jurisdiction of MSHA to issue subpoenas and to investigate the causes of an explosion at Kaiser's alumina refinery. MSHA's investigation was to determine whether there were civil or criminal violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq* (the "Mine Act"), the statute that creates and defines MSHA's jurisdiction and powers. In challenging the investigation and the subpoenas, Kaiser and the Kaiser employees challenged MSHA's jurisdiction over Kaiser and its employees. Kaiser also sought to protect certain documents from discovery on the ground that they are work product and that they are protected by the common law self-critical analysis privilege.

The Fifth Circuit Court of Appeals affirmed the conclusions of the district court (1) that Kaiser's refinery is a "mine" within the meaning of the Mine Act, (2) that MSHA may therefore exercise its Mine Act investigatory and subpoena powers against Kaiser and Kaiser's employees, and (3) that the documents in question are discoverable by MSHA and not privileged or protected.

After the issuance of the District Court's order, the investigation continued. MSHA ultimately issued citations and assessed civil penalties against Kaiser and certain Kaiser employees for alleged violations of the Mine Act. Kaiser and the employees then initiated administrative proceedings to formally contest the citations and the penalties before the Federal Mine Safety and Health Review Commission pursuant to 30 U.S.C. § 815(d). The Settlement resolves those contest proceedings, except for the issues before this Court.

The Terms of the Settlement

In order to resolve the contest proceedings, Kaiser and two individual employees have agreed to pay monetary penalties, and Kaiser has agreed to undertake a program of future actions. The Settlement does not resolve the jurisdictional and privilege issues raised in Kaiser's Petition, and it expressly reserves them. Under the Settlement, resolution of those issues will depend on the disposition by this Court of Kaiser's Petition. The Settlement is thus subject to any decision on the merits by this Court.

Thus the Settlement provides in part:

> 6 . . . . This agreement is entered into by both parties in lieu of continued litigation under the Mine Act, *other than the issues raised in Kaiser's pending Petition for Certiorari* . . . . The parties have taken different positions regarding the validity of the citations and orders and the appropriate level of negligence. . . . Kaiser does not admit . . . the validity of the citations

> and orders . . . . Kaiser and the Secretary are entering this agreement without prejudice to their rights to make future arguments or raise any defenses in any other cases, *including the pending Petition for Certiorari* . . . , and . . . Kaiser and the Secretary retain their right to assert in any subsequent action that conditions or practices cited in the original citations, or the amended citations or orders, may or may not be violations of standards or provisions of the Mine Act.
>
> . . . .
>
> 8 . . . . This settlement agreement is acknowledged by the parties to be a global and final resolution of all outstanding and potential matters resulting from or related to the July 5, 1990 event and the Secretary's investigation thereof, *except for the issues raised in Kaiser's pending Petition for Certiorari* . . . . [Emphasis supplied].

The Live Issues Before This Court

The issues raised in Kaiser's Petition remain "live." Both parties retain a "legally cognizable interest in the outcome," and there is every reason to expect that "the wrong will be repeated." *Erie v. Pap's A.M.*, 529 U.S. 277, ____, 120 S.Ct. 1382, 1390 (2000), and cases cited.

1. As indicated above, the Settlement reserves and does not address the issues pending before this Court. Neither Kaiser nor MSHA have, by the Settlement, modified or resolved their differences on any of the issues set out in Kaiser's Petition. MSHA's ability to enforce the Settlement, including the program of future actions to be undertaken by Kaiser, will necessarily be subject to any determination by this Court of MSHA's jurisdiction over Kaiser.
2. MSHA continues to assert that Kaiser's facility is a "mine" subject to MSHA's jurisdiction under the Mine Act, and Kaiser continues to assert the contrary.

There is a continuing live dispute between the parties over whether MSHA has statutory jurisdiction to regulate and investigate Kaiser, its facilities, and its employees.

3. MSHA asserts a continuing right to investigate any condition in Kaiser's refinery that it believes may be a violation of the Mine Act. By their nature, MSHA's investigations under the Mine Act are normally of brief duration and will typically be concluded in a matter of weeks, days, or even hours. MSHA's wrongful assertion of a power to investigate Kaiser is thus a wrong which is capable of constant and continuing repetition but evading review.

4. MSHA asserts that Kaiser has a continuing obligation, under pain of civil and criminal penalties, to comply with all provisions of the Mine Act and with numerous mandatory regulations issued by MSHA, including continuing record-keeping, training, and reporting obligations, as set out in Title 30 of the Code of Federal Regulations. Kaiser contends that it has no such continuing obligation because Kaiser's refinery is not a mine.

5. The erroneous decision of the Fifth Circuit, entered without regard to this Court's recent controlling precedent, if not vacated, will have preclusive *res judicata* effect against Kaiser in future disputes over MSHA's jurisdiction.

6. MSHA is aware that a decision by this Court will determine its jurisdiction to regulate, not only Kaiser's alumina refinery, but also the alumina refineries of other companies. Thus, for example, a proceeding now pending before the Federal Mine Safety and Health Review Commission, involving citations for alleged violations of the Mine Act at the

facility of another alumina refiner, has been stayed pending this Court's disposition of Kaiser's Petition.[1]

7. As a result of the district court's order enforcing the subpoena, documents for which Kaiser claims protection were involuntarily turned over to MSHA. However, in receiving the documents, MSHA agreed informally that the documents would not be disclosed or made available to third parties until a final judicial resolution has been reached on Kaiser's claim that the documents are protected. If the Fifth Circuit's decision is vacated and reversed, Kaiser will be free to seek the return of the documents from MSHA.
8. If the Fifth Circuit's erroneous determination on the privilege issues is not reversed or vacated, that decision will have preclusive effect against Kaiser in civil litigation arising out of the explosion. Also, private litigants may seek the documents from MSHA under the Freedom of Information Act, 5 U.S.C. §552, or otherwise.
9. In the exercise of its investigative powers, MSHA asserts a continuing right to subpoena documents, from Kaiser and other entities, of the type Kaiser seeks to protect. MSHA like Kaiser, has a live interest in the collateral effects of the Fifth Circuit's decision on the privilege issues.

WHEREFORE, Kaiser respectfully advises the Court of the Settlement and advises the Court that the issues raised in Kaiser's petition remain live and continue to require review by this Court.

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[1] *Secretary of Labor v. Reintjes of the South, Inc.*, Docket Nos. Cent 99-152-RM, *et al.*

Respectfully submitted,

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APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION OFFICE OF ADMINISTRATIVE LAW JUDGES

CONTEST PROCEEDINGS

Docket Nos.: CENT 2000-122-M
through CENT 2000-132-R
Docket No.: CENT----------
Docket No.: CENT-----------

KAISER ALUMINUM & CHEMICAL CORP.,
Contestant,

vs.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION,
Respondent,

Citation Nos.:
7881936 through 7881956
Mine: Gramercy Works

UNITED STEELWORKERS OF AMERICA,
Intervenor,

and

CRAIG PRICE,
Intervenor

PENALTY PROCEEDINGS

Docket Nos. CENT 2000-200-M
& CENT 2000-201-M
AC Nos. 16-00352-05573 & 16-00352-05573

Docket Nos. CENT -----------
& CENT ------------
Mine: Gramercy Works

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION,
Petitioner

vs.

KAISER ALUMINUM & CHEMICAL CORP.,
Respondent

SECRETARY'S AMENDED MOTION TO APPROVE SETTLEMENT AND MOTION TO DISMISS

The Secretary of Labor, United States Department of Labor (Secretary) moves for an Order approving the proposed settlement agreement which the parties have reached with respect to the above captioned matters. In summary, Kaiser has agreed to withdraw its contest of the below-listed citations/orders and pay penalties in the amount of $513,000. The Secretary has agreed to vacate the remainder of the citations and orders at issue in the remaining dockets. In addition, the Secretary has issued two additional orders which Kaiser has contested and for which Kaiser agrees to pay penalties in the amount of $72,000 which is included in the total penalty payment of $513,000. Finally, two individuals have agreed to settle and pay $12,500 each in civil penalties assessed pursuant to Section 110(c) of the Mine Act, for violations which they had reason to know existed. The additional orders and the penalties under Section 110(a) and (c) have been assessed and contested by the Respondents. The Petitions for Assessment are being filed, and answered, and the cases are now being settled as part of this total global settlement between the Secretary of Labor, Kaiser Aluminum and Chemical Corporation, and the individual Respondents.

1. This case involves an investigation subsequent to an explosion that occurred on the morning of July 5, 1999 at the Gramercy Works Facility. A significant number of miners at the mine were injured, three of whom sustained severe disabling injuries. The Gramercy Works Facility is an alumina processing facility located in Gramercy, Louisiana. Although contested earlier in a public hearing subpoena challenge and retained as an issue for review in Kaiser's Petition for Certiorari (214 F.3d 586 (5th Cir. 2000)), for purposes of resolving this matter, the parties have agreed that the Gramercy Works Facility is a "mine" as defined under

Section 3(h) of the Mine Act. This mine was operated by Kaiser Aluminum and Chemical Corporation.

2. MSHA inspectors and investigators investigated the July 5, 1999 explosion. They concluded that the immediate cause of the explosion was an excessive pressure build up in pressure vessels in the digestion process area of the facility, following an electrical fault causing a power distribution failure, and the response thereto. MSHA found deficiencies in the pressure relief safety systems, which MSHA concluded were violations of the regulations. Several of the deficiencies were voluntarily disclosed to MSHA and other government agencies by Kaiser in a letter dated August 5, 1999. These conditions were set forth in the MSHA investigative report. MSHA also issued other citations and orders for violations of the regulations which took place during the investigative proceeding. See MSHA investigative report and the additional conclusions and amendments in this settlement agreement.

3. The Secretary and Kaiser have agreed to settle these matters. MSHA is agreeing to modify certain negligence level findings, and a gravity finding in one order and to vacate four orders, and Kaiser has agreed to pay agreed upon sums for the remaining citations and orders. Below is a list of the citations and orders and the disposition that the parties have agreed to:

Citation or Order	Alleged Negligence	Modifications Agreed Upon Penalty
7881936	High	$52,000
7881937	High	$52,000
7881938	High	$52,000
7881939	No changes	$52,000
7881940	High	$52,000
7881941	High	$52,000
7881942	vacated	N/A

Citation or Order	Alleged Negligence	Modifications Agreed Upon Penalty
7881943	vacated	N/A
7881944	High	$2,500
7881945	High	$2,500
7881946	High	$2,500
7881947	High	$2,500
7881948	vacated	N/A
788194	Moderate	$14,000
7881950	Moderate and Non-contributory	$10,000
7881951	Moderate	$14,000
7881952	Moderate	$14,000
7881953	no change	$16,000
7881954	no change	$16,000
7881955	no change	$16,000
7881956	vacated	N/A
7885803	no change	$10,000
7885804	no change	$9,000
7718310	no change	$52,000
7718308	no change	$20,000

With respect to the violations of 30 C.F.R. § 48.27(c) (Orders No. 7881949, 7881950, 7881951, 7881952), the reduction in negligence and modification of the violations to Section 104(a) citations, except for Order No. 7881950, acknowledges that proper emergency procedures task training is beyond that specifically required by other provisions of Part 48. The Secretary further determined that the digestion control room operator's conduct addressed in Order No. 7881950 did not contribute to the accident. Finally, the Secretary notes that each of the miners involved in these violations had training that was otherwise in compliance with 30 C.F.R. Part 48.

On October 26, 2000, two additional citations (No. 7718310 and 7718308) were issued for violative conditions.

MSHA proposed a civil penalty of $52,000 for one, and $20,000 for the other. Kaiser concurrently contested the citations and moved for consolidation with this case, and the penalties and citations are subject to the terms of this Motion and Settlement Agreement, with Kaiser agreeing to pay a $52,000 penalty for one and $20,000 for the other.

This settlement and the changes to the proposed penalties reflect that vagaries of litigation, and a compromise between the parties in light of the litigation.

4. The payment of the total sum of $513,000 by Kaiser Aluminum is appropriate and reflects due consideration of the nature of its conduct and the penalty criteria contained in §110(i) of the Act. The parties agree that the mine is a large facility and that the operator is a large company. The penalties, to be paid in twelve equal payments within one year from thirty days after the approval of this settlement motion, will not adversely affect the operator's ability to continue in business. The operator has a favorable history of prior violations and has promptly abated the cited conditions. Good faith abatement is also demonstrated by the prospective steps that the operator has agreed to take in this matter as set forth in Paragraph 9 below.

5. For the sole purposes of this settlement motion the parties agree that the gravity associated with these violations is as stated in the citations and orders, including the amendment to Order No. 7881950.

6. This agreement is entered into by both parties in lieu of continued litigation under the Mine Act, other than the issues raised in Kaiser's pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000). The parties have taken different positions regarding the validity of the citations and orders and the appropriate level of negligence. The Secretary has agreed to modify the alleged negligence levels of some of the above listed citations and orders as set forth in Paragraph 3, to

reflect a high level of ordinary negligence. The parties agree that for all purposes except those delineated in *Secretary v. Amax Lead Co.*, 4 FMSHRC 975 (FMSHRC 1982), Kaiser does not admit either the validity of the citations and orders, the alleged levels of negligence, or the facts alleged by the citations, orders, or any and all reports of MSHA or its personnel. The parties further agree that for purposes of all actions except for actions to which the United States and/or the Secretary of Labor is a defendant, nothing herein shall be construed as an admission by Kaiser. The parties agree that for all purposes except those delineated in *Secretary v. Amax Lead Co.*, 4 FMSHRC 975 (FMSHRC 1982), Kaiser and the Secretary are entering this agreement without prejudice to their rights to make future arguments or raise any defenses in any other cases, including the pending Petition for Certiorari (214 F.3d 586 (5th Cir. 2000) and, for all purposes except those delineated in *Secretary v. Amax Lead Co.*, 4 FMSHRC 975 (FMSHRC 1982), Kaiser and the Secretary retain their right to assert in any subsequent action that conditions or practices cited in the original citations, or the amended citations or orders, may or may not be violations of standards or provisions of the Mine Act.

7. Pursuant to Section 110(c) of the Mine Act, two parties who had reason to know regulatory violations existed, received personal civil penalties of $12,500 each. The two parties exercised their right to contest the proposed penalties and agreed to pay them, without admissions, pursuant to the terms of the attached settlement motions.

8. The Secretary will not take any further action relating to the actions, events, or violations at issue in these proceedings against Kaiser or its corporate agents, nor will she refer any further action against Kaiser or its corporate agents relating to the actions, events, or violations at issue here to any other agency. This settlement agreement is acknowledged by the parties to be a global and final resolution of all outstanding

and potential matters resulting from or related to the July 5, 1999 event and the Secretary's investigation thereof, except for the issues raised in Kaiser's pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000). Further, upon request by Kaiser, the undersigned counsel for the Secretary will inform any other government agency or department of the finality of this settlement.

9. As indicated in the attached document (Exhibit A), the respondent has agreed to undertake a program of prospective efforts, thereby demonstrating additional good faith in abatement of the conditions at issue in these proceedings.

WHEREFORE, the Secretary moves for approval of this proposed settlement and an order requiring compliance with the payment plan agreed to herein.

DATED: December 8, 2000

Respectfully submitted,

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EXHIBIT A

[Exhibit A sets out engineering, operating, auditing and reporting undertakings of Kaiser]

③

Supreme Court, U.S.
FILED

FEB 15 2001

CLERK

No. 00-770

In the Supreme Court of the United States

KAISER ALUMINUM AND CHEMICAL CORP.,
PETITIONER

v.

DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH
ADMINISTRATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly deferred to the determination by the Mine Safety and Health Administration (MSHA) that "milling" under the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 802(h)(1), includes the processing of bauxite into alumina.

2. Whether the statutory authorization for MSHA to determine what constitutes milling under the Mine Act is unconstitutional.

3. Whether the rule of lenity prohibits deference to MSHA's interpretation of milling.

4. Whether documents that are created when litigation is not imminent and primarily because of safety concerns are protected by the work-product privilege.

5. Whether a federal self-critical analysis privilege shields documents from a government investigation.

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In the Supreme Court of the United States

No. 00-770

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is reported at 214 F.3d 586. The opinions and orders of the district court (Pet. App. 15a, 16a, 17a-21a, 22a-23a, 24a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2000. A petition for rehearing was denied on August 14, 2000 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on November 13, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, assigns to the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), the responsibility to issue mandatory safety and health standards, 30 U.S.C. 811, conduct inspections and investigations, 30 U.S.C. 813, and enforce the Mine Act by issuing citations and withdrawal orders, 30 U.S.C. 814. The Mine Act covers "[e]ach coal or other mine," 30 U.S.C. 803, a term of art that is broadly defined to include places where minerals are "extract[ed]," "mill[ed]," or "prepar[ed]." 30 U.S.C. 802(h)(1); Pet. App. 9a; *RNS Servs., Inc.* v. *Secretary of Labor*, 115 F.3d 182, 186 (3d Cir. 1997); *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1551-1552 (D.C. Cir. 1984). The term "milling" is not expressly defined. Instead, the Mine Act contemplates that the Secretary will "mak[e] a determination of what constitutes mineral milling." 30 U.S.C. 802(h)(1).

In conducting investigations, the Secretary may proceed informally or may hold a public hearing and issue subpoenas, which a federal district court enforces upon the Secretary's application. 30 U.S.C. 813(b). A mine operator that contests a citation or order issued by the Secretary as a result of an investigation may obtain a hearing before an administrative law judge of the Federal Mine Safety and Health Review Commission and may thereafter request discretionary review before the Commission. 30 U.S.C. 815(d), 823(d); see *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 204 (1994). Final decisions of the Commission are reviewable in the courts of appeals. 30 U.S.C. 816.

2. a. Petitioner operates an alumina processing facility in Gramercy, Louisiana. Pet. App. 4a. Alumina processing is the first step in the production of aluminum from bauxite and other ores. *Id.* at 8a. After the bauxite is processed into alumina at petitioner's plant, petitioner sells the alumina to other entities that smelt it to make aluminum metal. *Id.* at 4a.

Following an explosion at petitioner's plant on July 5, 1999, MSHA convened a public hearing to investigate the explosion and issued subpoenas for the attendance of witnesses and the production of documents. Pet. App. 4a. Petitioner moved to quash the subpoenas, and MSHA sought their enforcement in the United States District Court for the Eastern District of Louisiana. *Ibid.*

b. The district court, reviewing and affirming a magistrate's decision, ordered petitioner to produce certain pre-accident documents that petitioner claimed were privileged as work product and "self-critical analysis." Pet. App. 22a-23a, 24a n.2. The magistrate found that "many of the documents were generated because of safety, rather than litigation, issues," and thus are not protected by the attorney work-product privilege. *Id.* at 26a-27a. In addition, the magistrate ruled that the "self-evaluation privilege," if it exists, does not apply against the government. *Id.* at 28a. Alternatively, the magistrate concluded, the public's interest in information about safety risks at petitioner's plant outweighs petitioner's interest in keeping secret its evaluation of safety issues. *Id.* at 29a.

The district court further ruled that MSHA had jurisdiction to investigate the July 5 explosion. Pet. App. 15a, 17a-21a. The court noted that the Mine Act covers facilities engaged in "milling" and held that "milling" includes "the type of process that goes on at the Kaiser facility in Gramercy." *Id.* at 18a. The court found persuasive Judge Bork's analysis in *Carolina Stalite*, 734 F.2d at 1551-1552, which identifies the statutory and legislative bases for broad coverage and deference to the Secretary's interpretation of the Act, particularly the term "mineral milling." Pet. App. 18a-19a. The court observed that, although "an average lay person would not consider the Gramercy Kaiser plant to be a mine," the courts have not employed that test. *Id.* at 20a. Rather, they look to how the Act defines "mine," *ibid.*, and, in accordance with the legislative history, resolve doubts "in favor of inclusion of a facility within the coverage of the act." *Id.* at 21a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court first rejected petitioner's contention that MSHA lacks jurisdiction over the plant. *Id.* at 6a-13a.[1] The court explained that whether MSHA has jurisdiction turns on whether alumina processing constitutes "milling," a term included within the definition of "mine" in Section 802(h)(1). *Id.* at 8a. The court agreed with other courts of appeals that the Act's definition of "mine" is "sweeping" and "encompasses much more than the usual meaning attributed to it." *Id.* at 7a (quoting *Bush & Burchett, Inc.* v. *Reich*, 117 F.3d 932, 936 (6th Cir.), cert. denied, 522 U.S. 807 (1997)). The court observed that Section 802(h)(1) explicitly delegates to the Secretary the authority to define "milling" and agreed with the D.C. Circuit's conclusion that "this language 'gives the Secretary discretion, within reason,

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[1] In so doing, the court rejected MSHA's contention, see pp. 7-8, *infra*, that petitioner could not properly raise its jurisdictional argument in a subpoena enforcement proceeding.

to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference . . . by . . . the courts.'" Pet. App. 9a (quoting *Carolina Stalite*, 734 F.2d at 1552 & n.9).

The court then held that the Secretary's definition of "milling," which is contained in a 1979 memorandum of understanding (MOU) between MSHA and the Occupational Safety and Health Administrative (OSHA), Pet. App. 30a-43a (44 Fed. Reg. 22,827-22,830 (1979)), is reasonable. The court noted that the MOU "expressly includes alumina plants within the jurisdiction of MSHA" and "could not be more clear" that MSHA's jurisdiction over alumina plants derives from congressional authorization in the Act. Pet. App. 11a. The court found MSHA's definition consistent with those in geological and mining dictionaries and with the Mine Act's legislative history, which instructs that "mine" be given the broadest possible interpretation and warns against the dangers of liquid and chemical milling operations. *Id.* at 11a-12a. The court rejected petitioner's proposed definition of milling, which limits the term to physical processes, as incompatible with the plain language of the Act, which does not exclude chemical processes. *Id.* at 12a-13a.

On the privilege issues, the court of appeals noted that the disputed documents were not included in the record on appeal. Pet. App. 13a. The court nonetheless affirmed the rulings of the district court and the magistrate (who had both examined the documents in camera) as correct applications of Fifth Circuit precedent. Under that precedent, the work-product privilege applies "where litigation is not imminent, 'as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.'" *Id.* at 13a-14a.

Regarding the self-critical analysis privilege, the court of appeals observed that new privileges are not "lightly created nor expansively construed." Pet. App. 14a (quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). Moreover, the court observed that the Fifth Circuit has not adopted the privilege, and other courts of appeals have uniformly rejected its application against the government. *Ibid.* Therefore, the court declined to decide whether the privilege exists, but held that it does not protect documents against government investigation. *Ibid.*

Petitioner sought panel rehearing and rehearing en banc. The court of appeals unanimously denied those requests. Pet. App. 1a-2a.

4. While petitioner's challenges to the subpoenas were proceeding through the courts, MSHA issued a report concluding that the July 5, 1999, explosion resulted from operation of petitioner's facility at excessive pressure and petitioner's failure to maintain the pressure relief safety systems. MSHA therefore issued 23 citations and proposed $533,000 in fines. In December 2000, MSHA and petitioner entered into a settlement agreement, which requires petitioner and two corporate officials to pay $538,000 in fines and provides for prospective safety measures with MSHA oversight of the plant. See Settlement Agreement ¶¶ 4, 7; *id.* Exh. A ¶¶ (h), (k) and (n); App., *infra*, 5a, 7a, 16a, 17a, 18a.

ARGUMENT

Although the court of appeals should have declined to reach the merits of petitioner's jurisdictional argument, the court correctly concluded that MSHA has jurisdiction over petitioner's plant and correctly rejected petitioner's privilege claims. The court's decision does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Because this is a subpoena enforcement proceeding, the court of appeals erred in reaching the merits of petitioner's argument that MSHA lacks jurisdiction over petitioner's plant. This Court has made plain that the courts should not decide statutory coverage questions in such proceedings. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (judicial review is limited to determining whether the subpoena is "plainly incompetent or irrelevant to any lawful purpose"). Accord *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 210 (1946); see also *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Coverage questions may be addressed in any administrative enforcement proceeding that is ultimately brought and in judicial review of that proceeding.

The Court's reasoning in *Endicott Johnson*—that judicial intervention at the subpoena stage would undermine the agency's delegated authority and interfere with sound administrative practice, 317 U.S. at 507-508—is particularly compelling here. MSHA's lawful purpose was to investigate an explosion at the facility—an investigation that resulted in 23 citations and proposed fines of $533,000. Until this case, petitioner has for 20 years voluntarily submitted mine identification forms and not contested on jurisdictional grounds the issuance of over 450 citations. See Gov't C.A. Br. 35-36. In fact, petitioner has affirmatively conceded MSHA jurisdiction in one case before the Federal Mine Safety and Health Review Commission. See *Kaiser Aluminum & Chem. Corp.* v. *Secretary of Labor*, 3 F.M.S.H.R.C. 2296, 2298 (1981). Moreover, after petitioner filed its petition for a writ of certiorari, the parties settled the underlying enforcement action and, in the process, agreed to prospective oversight by MSHA over the facility. See p. 6, *supra*; Settlement Agreement Exh. A ¶¶ (h), (k) and (n); App., *infra*, 16a, 17a, 18a. The circumstances of this case thus illustrate the wisdom of this Court's precedent limiting the issues that are subject to review in such proceedings.

b. On the merits of petitioner's jurisdictional argument, the court of appeals correctly concluded that the alumina processing performed at petitioner's plant constitutes "milling" under the Mine Act. "Milling" (along with "extracting" and "preparing") is one of three basic mining activities covered in the Act's "sweeping" definition of "mine." Pet. App. 7a.[2] None of those terms is otherwise defined in the Act with respect to mineral mining. Cf. 30 U.S.C. 802(i) (defining *coal* preparation). The Act directs, however, that, "[i]n making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." 30 U.S.C. 802(h)(1). This provision gives the Secretary reasonable discretion to determine what is

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[2] The statutory definition of mine includes in relevant part

> (C) * * * structures, facilities, * * * or other property * * * used in * * * the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in * * * the milling of such minerals, or the work of preparing coal or other minerals.

30 U.S.C. 802(h)(1).

"milling" and requires judicial deference to that determination. Pet. App. 9a (quoting *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1552 & n.9 (D.C. Cir. 1984)).

By assigning enforcement responsibility over all mining activity to a single agency, Congress intended to avoid overlapping inspections of milling operations by MSHA and OSHA. H.R. Rep. No. 312, 95th Cong., 1st Sess. 16, 22 (1977); S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 38 (1977). In so doing, Congress noted with approval a prior interagency agreement between OSHA and the Mining Enforcement and Safety Administration (MESA), MSHA's predecessor, which had largely "alleviated" the problem of conflicting jurisdiction over milling operations under the Occupational Safety and Health Act of 1970 (OSH Act) and the now-repealed Federal Metal and Nonmetallic Mine Safety Act by conferring jurisdiction over such operations, including alumina processing, on MESA. H.R. Rep. No. 312, *supra*, at 16.

The Secretary, exercising his discretion to define "milling" in the same manner that Congress previously commended, thereafter adopted and published in the Federal Register an interagency agreement between MSHA and OSHA. Pet. App. 30a-43a; 44 Fed. Reg. 22,827-22,830 (1979). The MOU tracks the prior MESA/OSHA agreement by adopting verbatim that earlier agreement's expansive description of "milling" and provides a similar illustrative list of processes that fall within the term "milling," such as "concentrating" and "calcining," as well as "leaching," "drying," "roasting," and "kiln treatment," *id.* at 22,829, all of which are performed at petitioner's facility, see Pet. App. 8a, 39a, 40a. The MSHA/OSHA agreement also makes explicit what was implicit in the prior MESA/OSHA agreement: "MSHA jurisdiction includes * * * alumina * * * plants." *Id.* at 22,828; Pet. App. 11a.

As the court of appeals correctly observed, Pet. App. 11a-12a, the definition of "milling" contained in the interagency agreement is similar to definitions in geological and mining dictionaries and is consistent with the clearly expressed legislative intent that "mine" "be given the broadest possible interpretation" and that "doubts be resolved in favor of inclusion of a facility" within Mine Act coverage. *Ibid.* (citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977)). Moreover, the court below correctly pointed out that the Mine Act was intended to address dangers associated with "chemical processing of ores" and milling operations where the ore (as at petitioner's facility) is liquified, vaporized, and condensed. *Id.* at 12a (citing H.R. Rep. No. 312, *supra,* at 10-11). In light of the express statutory assignment of authority to the Secretary, the clear legislative intent, and the supporting scientific and technical material, the court of appeals properly deferred to the agency's interpretation of "milling." Pet. App. 11a-12a; accord *Carolina Stalite*, 734 F.2d at 1551-1554.

c. The court of appeals' decision applies the bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 865 (1984). Deference is particularly appropriate where, as here, Congress has expressly assigned to the agency the authority to interpret a provision. See *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994); *Chevron*, 467 U.S. at 844. Petitioner nonetheless contends (Pet. 10-12), relying on *Christensen* v. *Harris*

County, 529 U.S. 576 (2000), that *Chevron* deference was improper because the Secretary exercised her assigned authority to interpret "milling" through an interagency agreement. *Christensen*, however, provides no aid to petitioner, for several reasons.

First, although *Christensen* was decided before the court of appeals issued its opinion, petitioner did not bring the case to that court's attention until its petition for rehearing. See Fed. R. App. P. 28(j) (allowing litigants to bring pertinent authorities to court's attention after briefs have been filed); *Glover* v. *United States*, 121 S. Ct. 696, 701 (2001) (this Court ordinarily does not decide questions neither raised nor decided below).

Second, *Christensen* does not preclude the application of *Chevron* deference under the circumstances of this case. *Christensen* did not involve an express congressional assignment of interpretative authority, such as the one in the Mine Act. Even with respect to situations in which Congress has not expressly empowered an agency to interpret a statutory term, *Christensen* holds only that *informal* agency interpretations, such as private "opinion letters," "policy statements, agency manuals, and enforcement guidelines," warrant less than *Chevron* deference. 529 U.S. at 587 (citing 1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 3.5 (3d ed. 1994)). Less deference is accorded such interpretations because they are issued in a format that "Congress has not authorized for that purpose." 1 Davis & Pierce, *supra*, at 120. In contrast, interpretations in "a form expressly provided for by Congress" are entitled to *Chevron*- type deference. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991). MSHA has interpreted "milling" to include the processing of alumina in two formats, both of which are formats authorized by Congress. MSHA's interpretation is reflected in the issuance of citations and orders, including more than 450 citations to petitioner over the last 20 years. See p. 7, *supra*; 30 U.S.C. 814 (authorizing the Secretary to issue citations); *Martin*, 499 U.S. at 157 (deferring to Secretary's interpretation reflected in citation under the OSH Act). MSHA's interpretation is also reflected in the interpretative rule that the Secretary published in the Federal Register in the form of an MOU between MSHA and OSHA, a form previously approved by Congress. See p. 9, *supra* (noting that Congress, in providing for the Secretary to define "milling," approved prior MOU); 30 U.S.C. 957 (authorizing Secretary to promulgate regulations to carry out the Mine Act).

Third, there is no reason to believe that the court of appeals' decision that MSHA has jurisdiction over petitioner's plant turned on the level of deference that the court accorded the Secretary's interpretation of "milling." The Secretary's interpretation is well-reasoned, based on thorough consideration, and consistent with long-standing policies (of which Congress was aware and which it approved when enacting the Mine Act).[3] The interpretation is thus worthy of deference under any standard. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Carolina Stalite*, 734 F.2d at 1552 (noting that the Secretary's determination is "well within the bounds of reasonableness" and according it "the deference it deserves"). Finally, there is no conflict among the courts of appeals on the level of deference owed the Secretary's definition of "milling," either in general, or as applied to alumina processing in particular.

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[3] By contrast, petitioner's cabining of "milling" to simple physical processes (Pet. 5; Pet. App. 12a) conflicts with the regulatory and legislative history, as well as the fact that Congress could have, but did not, limit the term in that manner. *Id.* at 12a.

d. Petitioner's next argument—that the statutory authorization for the Secretary to consider administrative convenience in determining what constitutes "milling" violates the nondelegation principle (Pet. 12-15)—is also neither properly presented nor persuasive. Like the *Christensen* issue, the nondelegation issue was not presented to the court of appeals before the rehearing petition. In any event, this Court has repeatedly held that Congress does not violate the Constitution "merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)).

Those parameters are easily met here. The term "milling," although statutorily undefined, is not an empty vessel. It has particular technical and scientific meanings, which, as the court of appeals noted (Pet. App. 11a), comport with the Secretary's definition. See also *id.* at 36a (interagency agreement relies on mining textbook for discussion of milling). Congress also directed the Secretary, when defining the scope of "milling," to consider the "convenience of administration" in vesting regulatory oversight in one agency. 30 U.S.C. 802(h)(1). Congress further indicated that the Secretary should give "mine" its broadest possible scope and should resolve any doubts in favor of Mine Act coverage. S. Rep. No. 181, *supra*, at 14. Given those clear and intelligible directions, the statutory authorization did not overstep constitutional bounds.[4]

e. Petitioner also errs in contending (Pet. 15-19) that the rule of lenity precludes judicial deference to the Secretary's milling determination. The rule of lenity resolves "ambiguity concerning the ambit of criminal statutes * * * in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). It provides that, "when choice has to be made between two readings of what conduct Congress has made a crime," a court should not choose the harsher alternative unless Congress has "spoken in language that is clear and definite." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)). The rule is irrelevant to the proper interpretation of "milling" under the Mine Act, because the Act does not criminalize "milling." Criminal penalties under the Act apply to willful violations of mandatory health and safety standards or knowing violations of withdrawal orders. 30 U.S.C. 820(d). Moreover, there are no criminal penalties at issue in this case, nor will there be. See Settlement Agreement ¶ 7; App., *infra*, 7a.[5]

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[4] Petitioner contends (Pet. 13 n.20) that the nondelegation issue arises not from the statutory text itself, but from the panel's construction of the text. Petitioner suggests that the court of appeals erred in not restricting the statutory delegation to "facilities located adjacent to acknowledged mining facilities" and excluding "freestanding manufacturing facilities like [petitioner's] which are not physically adjacent to mines regulated by MSHA." *Ibid.* That is not a nondelegation argument, but simply a claim that the court of appeals misinterpreted the Act. That claim is not worthy of this Court's review, and is, in any event, unsupported by the text of the Act, which does not limit coverage to milling facilities that are adjacent to extraction facilities.

The rule of lenity is "premised on two ideas: First, '"a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed"'; second, 'legislatures and not courts should define criminal activity.'" *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (quoting *Bass*, 404 U.S. at 347-350). Neither premise pertains here. Petitioner concedes that it knew that its operations fell within "milling" as the Secretary interpreted it. Pet. 15 n.24; see also p. 7, *supra* (noting that petitioner had not contested MSHA jurisdiction over its plant for 20 years); *Babbitt*, 515 U.S. at 704 n.18 (regulation in existence for 20 years provided fair notice and precluded operation of rule of lenity). In addition, the rule has no application where, as here, a party makes a facial challenge to an agency's formal interpretation of a statute. Pet. 15; *Babbitt*, 515 U.S. at 704 n.18 ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000).

2. a. Petitioner also mistakenly contends (Pet. 20-26) that the court of appeals erred in not shielding certain

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[5] *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992), on which petitioner relies, is inapposite. In that case, this Court applied the rule of lenity even though only civil sanctions were at issue because the criminal prohibitions under the statute in that case carried no additional requirement of willfulness. Under the Mine Act, however, criminal penalties may be imposed only for willful or knowing violations.

documents as attorney work product.[6] As petitioner points out, the Fifth and Second Circuits have used somewhat different language in describing the standard for determining when documents are "prepared in anticipation of litigation" under Federal Rule of Civil Procedure 26(b)(3). The different formulations do not, however, generally lead to different outcomes and would not lead to a different outcome in this case. Therefore, this case is not an appropriate one for resolving any disagreement that may exist. Cf. *Upjohn Co.* v. *United States*, 449 U.S. 383, 396-397 (1981) (refusing to draft set of rules applying attorney-client privilege and relying instead on case-by-case method for determining boundaries of privilege).[7]

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[6] We have been informed by the Department of Labor that petitioner voluntarily provided MSHA with the most significant of the five or six documents at issue.

[7] Contrary to petitioner's unsupported assertion (Pet. 21), *Delaney, Migdail & Young, Chartered* v. *IRS*, 826 F.2d 124 (D.C. Cir. 1987), and *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980), are not "irreconcilably inconsistent" with the decision in this case. Neither case advances a general rule for determining when documents are prepared in anticipation of litigation. Moreover, the results in those cases would have been the same had those courts applied the Fifth Circuit's formulation. In *Delaney*, the plaintiff sought production of IRS legal memoranda evaluating the legal vulnerabilities of a particular program, "precisely the type of discovery the Court refused to permit in *Hickman v. Taylor*, 329 U.S. 495, 513 * * * (1947)," 826 F.2d at 127, and it was not seriously contested that the documents were prepared in anticipation of litigation. *Id.* at 126. In *In re Special September 1978 Grand Jury (II)*, the sought-after documents had been prepared by a law firm *after* it was apprised of a grand jury investigation. 640 F.2d at 61-62. The litigation was "imminent," and the case thus falls outside the Fifth Circuit's primary motivating purpose rule.

The Second Circuit has adopted a general formulation espoused by Professor Wright: Documents are attorney work product "if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.'" *United States* v. *Adlman,* 134 F.3d 1194, 1202 (2d Cir. 1998). The Fifth Circuit has stated that "the privilege can apply where litigation is not imminent, 'as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.'" Pet. App. 13a-14a. The two formulations, although cast in different language, are harmonious and lead to similar results. See *Babcock & Wilcox Co.* v. *OSHRC,* 622 F.2d 1160, 1168 (3d Cir. 1980) ("It is not unusual that different words are used to describe the same basic concept. Our literature would indeed be sterile if that were not the case.").

The primary motivating purpose rule, which by its terms applies only when litigation is not imminent, is in essence a specific adaptation of the more general "facts and circumstances" analysis. In cases in which the prospect of litigation is distant or improbable (*i.e.*, not imminent), the causation element of the "facts and circumstances" test requires that the document be more closely associated with a litigation, rather than a business, purpose. See, *e.g.*, *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) ("[B]ecause litigation is an ever-present possibility in American life, it is more often the case than not that events are documented with the general possibility of litigation in mind. Yet, '[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials' with work product immunity. The document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events * * *. Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.") (internal citations omitted). Thus, the two formulations are consistent when they are applied to similar facts.[8]

Moreover, the outcome in this case would be the same even under the Second Circuit's approach. The magistrate judge and district court, following in camera review of the allegedly privileged documents, determined that "it is readily apparent that many of the documents were generated *because of* safety, rather than litigation, issues." Pet. App. 27a (emphasis added). Thus, inspection of the documents apparently revealed that they had *no* litigation purpose and fall outside any accepted construction of the work-product doctrine. Further, petitioner's failure to include the documents in the record on appeal, *id.* at 13a, prevented the court of appeals from reviewing the district court's factual findings, and consequently, precluded petitioner from carrying its burden on appeal of demonstrating that the disputed documents fall within the exception. See, *e.g.*, *Hodges, Grant & Kaufmann* v. *United States Gov't*, 768 F.2d 719, 721 (5th Cir. 1985); *Holmes* v. *Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000).

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[8] The Second Circuit has criticized the primary motivating purpose rule, *Adlman*, 134 F.3d at 1198-1202, but that criticism was based largely on a misunderstanding of the rule. The panel in *Adlman* failed to recognize that the Fifth Circuit rule applies only in cases in which litigation is not imminent, and the panel wrongly believed that, in order to meet the Fifth Circuit rule, documents must primarily assist in the conduct of litigation. *Id.* at 1198. In fact, the Fifth Circuit rule examines the motivating purpose behind the document's *creation* and also whether it could aid in possible litigation. The term "aid" is far broader than construed by the *Adlman* panel. Indeed, it is hard to imagine a case where a document was prepared "because of" litigation but did not "aid" the litigation in some fashion. For instance, documents containing discarded legal theories provide aid by focusing counsel on legal strategies that may be more successful.

b. Finally, petitioner contends (Pet. 26-30) that the Court should grant review to resolve a conflict among the courts of appeals over the existence of a "self-critical analysis privilege." This case does not present an occasion to resolve that conflict, however, because the court of appeals expressly declined to decide whether such a privilege exists. See Pet. App. 14a ("We need not decide whether a self-evaluation privilege should ever be recognized."). Instead, the court followed a uniform line of court of appeals decisions that have rejected application of the self-critical analysis privilege in cases in which the government seeks access to documents. *Ibid.* See, *e.g.*, *FTC* v. *TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (citing *Emerson Elec. Co.* v. *Schlesinger*, 609 F.2d 898 (8th Cir. 1979); *United States* v. *Noall*, 587 F.2d 123 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979); *Reynolds Metals Co.* v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), cert. denied, 435 U.S. 995 (1978)).[9]

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[9] Petitioner incorrectly asserts (Pet. 27-28) that the decision in this case conflicts with *ASARCO, Inc.* v. *NLRB*, 805 F.2d 194, 200 (6th Cir. 1986), and the unpublished memorandum opinion in *Bredice* v. *Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973) (Table). *Bredice* did not involve a government request for documents, and, in any event, the D.C. Circuit's published opinion in *FTC* v. *TRW* stands as governing circuit precedent. *ASARCO* also is inapposite. It was a labor relations case arising from a union's request for ASARCO's

The conclusion that no self-critical analysis privilege applies when the government subpoenas documents is supported by this Court's decision in *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990). In that case, the Court refused to protect from disclosure educational peer-review materials because Congress had given the EEOC a "broad right of access to relevant evidence * * * [and] d[id] not carve out any special privilege relating to peer review materials." *Id.* at 191. The Court further determined that maintaining the confidentiality of peer reviews, although important, does not outweigh the "great, if not compelling, governmental interest" in ferreting out discrimination. *Id.* at 193. As with the EEOC, Congress has placed no express limitations on MSHA's power to investigate an accident at a covered facility, 30 U.S.C. 813(b), and it has clearly expressed a compelling interest in protecting the safety of miners, the "most precious resource" in the mining industry. 30 U.S.C. 801(a).

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internal investigative report on a mine accident, which the union sought in order to perform its collective bargaining duties. The court held that the report was "not relevant or reasonably necessary to the Union's representative duties" and thus ASARCO properly withheld it. 805 F.2d at 200. The court did not uphold ASARCO's right to withhold the document based on the self-evaluation privilege. Moreover, a union, not the government, was seeking the document.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNERWOOD
Acting Solicitor General

JUDITH E. KRAMER
Acting Solicitor of Labor

ALLEN H. FELDMAN
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Department of Labor

FEBRUARY 2001

APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

Docket Nos.: CENT 2000-122-M
through CENT 2000-132-R
Docket No.: CENT 2001-40-RM
Docket No.: CENT 2001-41-RM
Citation Nos.: 7881936 through 7881956
Mine: Gramercy Works

KAISER ALUMINUM & CHEMICAL CORP., CONTESTANT

v.

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION, RESPONDENT

UNITED STEELWORKERS OF AMERICA,
INTERVENOR, AND CRAIG PRICE, INTERVENOR

CONTEST PROCEEDINGS

Docket Nos. CENT 2000-200-M
& CENT 2000-201-M
AC Nos. 16-00352-05573 & 16-00352-05573
Docket Nos. CENT 2001-51-M & AC No. 16-00352-05583
Mine: Gramercy Works

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION, PETITIONER

v.

KAISER ALUMINUM & CHEMICAL CORP., RESPONDENT

PENALTY PROCEEDINGS

SECRETARY'S REVISED MOTION TO APPROVE SETTLEMENT AND MOTION TO DISMISS

The Secretary of Labor, United States Department of Labor (Secretary) moves for an Order approving the proposed settlement agreement which the parties have reached with respect to the above-captioned matters. In summary, Kaiser has agreed to withdraw its contest of the below-listed citations/orders and pay penalties in the amount of $513,000.

The Secretary has agreed to vacate the remainder of the citations and orders at issue in the remaining dockets. In addition, the Secretary has issued two additional orders which Kaiser has contested and for which Kaiser agrees to pay penalties in the amount of $72,000 which is included in the total penalty payment of $513,000. Finally, two individuals have agreed to settle and pay $12,500 each in civil penalties assessed pursuant to Section 110(c) of the Mine Act, for violations which they had reason to know existed. The additional orders and the penalties under Section 110(a) and (c) have been assessed and contested by the Respondents. The Petitions for Assessment are being filed, and answered, and the cases are now being settled as part of this total global settlement between the Secretary of Labor, Kaiser Aluminum and Chemical Corporation, and the individual Respondents.

1. This case involves an investigation subsequent to an explosion that occurred on the morning of July 5, 1999 at the Gramercy Works Facility. A significant

number of miners at the mine were injured, three of whom sustained severe disabling injuries. The Gramercy Works Facility is an alumina processing facility located in Gramercy, Louisiana. Although contested earlier in a public hearing subpoena challenge and retained as an issue for review in Kaiser's Petition for Certiorari (214 F.3d 586 (5th Cir. 2000)), for purposes of resolving this matter, the parties have agreed that the Gramercy Works Facility is a "mine" as defined under Section 3(h) of the Mine Act. This mine was operated by Kaiser Aluminum and Chemical Corporation.

2. MSHA inspectors and investigators investigated the July 5, 1999 explosion. They concluded that the immediate cause of the explosion was an excessive pressure build up in pressure vessels in the digestion process area of the facility, following an electrical fault causing a power distribution failure, and the response thereto. MSHA found deficiencies in the pressure relief safety systems, which MSHA concluded were violations of the regulations. Several of the deficiencies were voluntarily disclosed to MSHA and other government agencies by Kaiser in a letter dated August 5, 1999. These conditions were set forth in the MSHA investigative report. MSHA also issued other citations and orders for violations of the regulations which took place during the investigative proceeding. See MSHA investigative report and the additional conclusions and amendments in this settlement agreement.

3. The Secretary and Kaiser have agreed to settle these matters. MSHA is agreeing to modify certain negligence level findings, and a gravity finding in one order and to vacate four orders, and Kaiser has agreed to pay agreed upon sums for the remaining citations

and orders. Below is a list of the citations and orders and the disposition that the parties have agreed to:

Citation or Order	Alleged Negligence Modifications	Agreed Upon Penalty
7881936	High	$52,000
7881937	High	$52,000
7881938	High	$52,000
7881939	No changes	$52,000
7881940	High	$52,000
7881941	High	$52,000
7881942	vacated	N/A
7881943	vacated	N/A
7881944	High	$2,500
7881945	High	$2,500
7881946	High	$2,500
7881947	High	$2,500
7881948	vacated	N/A
7881949	Moderate	$14,000
7881950	Moderate and Non-contributory	$10,000
7881951	Moderate	$14,000
7881952	Moderate	$14,000
7881953	no change	$16,000
7881954	no change	$16,000
7881955	no change	$16,000
7881956	vacated	N/A
7885803	no change	$10,000
7885804	no change	$9,000
7718310	no change	$52,000
7718308	no change	$20,000

With respect to the violations of 30 C.F.R. § 48.27(c) (Orders No. 7881949, 7881950, 7881951, 7881952), the reduction in negligence and modification of the violations to Section 104(a) citations, except for Order No. 7881950, acknowledges that proper emergency procedures task training is beyond that specifically required by other provisions of Part 48. The Secretary further determined that the digestion control room operator's conduct addressed in Order No. 7881950 did not contribute to the accident. Finally, the Secretary notes that each of the miners involved in these violations had training that was otherwise in compliance with 30 C.F.R. Part 48.

On October 26, 2000, two additional citations (No7718310 and 7718308) were issued for violative conditions. MSHA proposed a civil penalty of $52,000 for one, and $20,000 for the other. Kaiser concurrently contested the citations and moved for consolidation with this case, and the penalties and citations are subject to the terms of this Motion and Settlement Agreement, with Kaiser agreeing to pay a $52,000 penalty for one and $20,000 for the other. This settlement and the changes to the proposed penalties reflect the vagaries of litigation and a compromise between the parties in light of the risk of litigation.

4. The payment of the total sum of $513,000 by Kaiser Aluminum is appropriate and reflects due consideration of the nature of its conduct and the penalty criteria contained in §110(i) of the Act. The parties agree that the mine is a large facility and that the operator is a large company. The penalties, to be paid in twelve equal payments within one year from thirty days after the approval of this settlement motion, will not adversely affect the operator's ability to continue in business. The operator has a favorable history of prior violations and has promptly abated the cited conditions.

Good faith abatement is also demonstrated by the prospective steps that the operator has agreed to take in this matter as set forth in Paragraph 9 below.

5. For the sole purposes of this settlement motion the parties agree that the gravity associated with these violations is as stated in the citations and orders, including the amendment to Order No. 7881950.

6. This agreement is entered into by both parties in lieu of continued litigation under the Mine Act, other than the issues raised in Kaiser's pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000). The parties have taken different positions regarding the validity of the citations and orders and the appropriate level of negligence. The Secretary has agreed to modify the alleged negligence levels of some of the above listed citations and orders as set forth in Paragraph 3, to reflect a high level of ordinary negligence. The parties agree that for all purposes except those delineated in Secretary v. Amax Lead Co., 4 FMSHRC 975 (1982), Kaiser does not admit either the validity of the citations and orders, the alleged levels of negligence, or the facts alleged by the citations, orders, or any and all reports of MSHA or its personnel. The parties further agree that for purposes of all actions except for actions to which the United States and/or the Secretary of Labor is a defendant, nothing herein shall be construed as an admission by Kaiser. The parties agree that for all purposes except those delineated in Secretary v. Amax Lead Co., 4 FMSHRC 975 (1982), Kaiser and the Secretary are entering this agreement without prejudice to their rights to make future arguments or raise any defenses in any other cases, including the pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000), and,

for all purposes except for those delineated in Secretary v. Amax Lead Co., 4 FMSHRC 975 (1982), Kaiser and the Secretary retain their right to assert in any subsequent action that conditions or practices cited in the original citations, or the amended citations or orders, may or may not be violations of standards or provisions of the Mine Act.

7. Pursuant to Section 110(c) of the Mine Act, two parties who had reason to know regulatory violations existed, received personal civil penalties of $12,500 each. The two parties exercised their right to contest the proposed penalties and agreed to pay them, without admissions, pursuant to the terms of the attached settlement motions.

8. The Secretary will not take any further action relating to the actions, events, or violations at issue in these proceedings against Kaiser or any corporate agents, nor will she refer any further action against Kaiser or any corporate agents relating to the actions, events, or violations at issue here to any other agency. This settlement agreement is acknowledged by the parties to be a global and final resolution of all outstanding and potential matters resulting from or related to the July 5, 1999 event and the Secretary's investigation thereof, except for the issues raised in Kaiser's pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000). Further, upon request by Kaiser, the undersigned counsel for the Secretary will inform any other government agency or department of the finality of this settlement.

9. As indicated in the attached document (Exhibit A), the respondent has agreed to undertake a program of prospective efforts, thereby demonstrating addi-

tional good faith in abatement of the conditions at issue in these proceedings.

WHEREFORE, the Secretary moves for approval of this proposed settlement and an order requiring compliance with the payment plan agreed to herein.

DATED: 12/8/2000

Respectfully submitted,

HENRY L. SOLANO
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor of Labor

SHEILA K. CRONAN
Counsel for Trial Litigation

/s/ MARK R. MALECKI
MARK R. MALECKI
EDWARD H. FITCH IV
Trial Attorneys

U.S. Department of Labor
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CERTIFICATE OF SERVICE

I certify that copies of the Revised Motion to Approve Settlement were served on the following at the addresses and in the manner set forth below on this 8th day of December, 2000:

BY HAND DELIVERY:
Executive Director
Federal Mine Safety and
Health Review Commission
1730 K Street, N.W.
Sixth Floor
Washington, D.C. 20006

BY FACSIMILE AND FIRST CLASS MAIL:
Henry Chajet, Esq.
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BY CERTIFIED MAIL:
Harry Tuggle
United Steelworkers of America
Five Gateway Center, Room 902
Pittsburgh, PA 15222

/s/ MARK R. MALECKI

Settlement Motion Exhibit A: "Prospective Measures" Required By MSHA

(a) *American Society of Mechanical Engineers Boiler and Pressure Vessel Code*

1. All *new, year 1999-2000* vessels are in accordance with the ASME Code. All boilers were constructed and are maintained in accordance with ASME Code.

2. The revised Gramercy *Pressure Systems Control Policy* requires that maintenance of all pressure vessels and piping systems be in accordance with ASME Code.

3. Gramercy still has viable and safe equipment in use that was built and installed in the mid to late 1950's period. Some of this equipment was not constructed in accordance with current ASME Code. Much of it was constructed as American Petroleum Institute (API) class. There were not requirements at that time to conform with ASME Code and it is not feasible to apply the Code now. However, critical sections of the Plant were reviewed following the July 5, 1999 incident. It was found that certain heater vessels in HID and Evaporation had to be strengthened to meet the requirements of the new Gramercy operation. The vessels have been modified and the pressure ratings upgraded in accordance with professional engineering calculations. However, the older vessels do not have ASME codes.

(b) *Process Safety Management Programs (PSMP)*

1. Gramercy has implemented the Operational Integrity Management System (OIMS) as its Process Safety Management Program. All 13 elements of Kaiser's OIMS Manual are being implemented:

   - Employee Participation
   - Operational Safety Information
   - Operational Hazard Analysis
   - Standard Operating Procedures
   - Training
   - Contractor Safety
   - Mechanical Integrity
   - Pre-Startup Safety Review
   - Safe Work Policies
   - Management of Change
   - Incident Investigation
   - Compliance Inspections
   - Emergency Response and Planning

(c) *Pressure Relief Safety System Design Basis (PRSSDE)*

1. The new Gramercy Digestion installation has been designed for *Three Phrase* flow (solids, liquids, vapors). The design was done by ICF Kaiser Engineers (Australia) who have proprietary programs to calculate all parameters and predict responses to process upsets.

2. The Digestion relief system has been designed to relieve 120% of designed maximum flow for each tank in the case of a fully blocked condition and the relief headers have also been

designed to accommodate 150% of maximum design flow.

3. Additionally, pilot relief valves have been added to relieve at 90% MAWP, in order to reduce the potential frequency of opening the normal spring type relief valves.

4. The new Digestion relief headers are sloped to facilitate drainage in the case of a relief valve opening. The new main headers are 42 inches and 54 inches in diameter and should not be prone to plugging. There will also be a mandatory inspection program every 3 - 5 years and if required a clean out of the main headers will be done. The length of time between inspections will depend upon what is found in the initial inspection cycles. Temperature sensing devices have been placed in each relief header providing knowledge of relief valve lifts. Upon a lift, the cause will be determined and corrective action taken. If a sufficient number of significant events occurs, Kaiser will either run thermographic scans to determine if blockages have occurred or inspect the headers. In combination with the 3-5 yr mandatory inspection program, this process will be adequate to maintain the headers in operating condition. Temperature indicators have been installed in the relief systems so that any leakage or opening of the relief valves can be immediately determined and the cause corrected.

(d) *Valve Supervision Program*

Kaiser has updated all P&IDs for critical plant systems including identifying all valves. The engineering department's new pressure vessel engineer must approve any safety related valve modifications or changes, other than those included in normal operations. Kaiser's new Pressure Systems Control Policy, Section 6 ("the Blue Book") mandates specific policy and procedures, including audits to ensure compliance with company policy. The Blue Book is available for all employees and used in training. Kaiser has set up a relief valve tracking system that is set forth in Section 6 of its new Pressure Systems Control Policy. The digestion control room operator will be able to see the position of all process control valves from his video monitor. Moreover, the digestion control room operator will know the process flow path by the reaction of the process to the control valves. Further, Kaiser has a lock out/tag out system in place that will be used to identify any valves that have been adjusted for maintenance activities. The digestion shift supervisor has responsibility for the process and process safety and will delegate to the control room operator, as appropriate, tasks associated with process control and process safety.

(e) *Plant-Wide Evacuation Alarm System (PEAS)*

1. Gramercy has an alarm to evacuate the plant in the case of a toxic gas release (nearby Chlorine Plant). It is activated from the guardhouse at the main plant entrance. The plant has a radio system for backup. The

digestion control room can communicate instantly with the guard house by telephone.

2. Emergency response planning and training have been substantially improved, in coordination with the Louisiana State Policy and Parish Official. A plant wide system with both audio and visual notification, sourced from two locations with an emergency power backup will be investigated and a feasibility determination will be made.

(f) *Emergency Operating Procedures and Training*

1. Gramercy has just revised its major Standard Operating Procedures to include emergency shutdown procedures. Operators have and will continue to be trained and certified in these procedures.

2. Gramercy will participate in an MSHA review of these procedures and will upgrade them as required for safe operations.

(g) *Digestion Area Specific Design Features*

1. As required by MSHA, all new Digestion pressure vessels have been designed such that normal operating pressures are well below the MAWP and have an adequate safety margin between their MAWP and operating pressure. The relief tank does not have an MAWP since it is an open top tank.

Tank	Normal, psig	MAWP, psig
Blow Off Tank	0	70
No. 10 Flash Tank	8	100
No. 9 Flash Tank	14	150
No. 8 Flash Tank	22	150
No. 7 Flash Tank	38	150
No. 6 Flash Tank	55	200
No. 5 Flash Tank	75	330
No. 4 Flash Tank	100	330
No. 3 Flash Tank	140	460
No. 2 Flash Tank	195	460
No. 1 Flash Tank	270	460

(h) *Digestion Area Specific Operating Procedures*

1. Standard Operating Procedures and a Maintenance Program for Digestion are currently in place and available for employee and MSHA review. Kaiser will brief MAHA personnel on the new plant and operating systems and procedures, as well as make available for MSHA's review copies of its operating procedures and policies.

(i) *Training*

1. The Gramercy Plant's Pressure Systems Control Policy covers maximum allowable working pressures, Pressure Relief Systems, and hazards associated with non-functioning pressure relief systems.

2. Special training sessions were conducted with supervisors, superintendents, and managers to ensure full understanding of this policy. Hourly

employees receive this training as part of their orientation.

3. The training will be reviewed to ensure there is sufficient coverage concerning hazards associated with non-functioning pressure relief systems.

(j) *Safety Showers and Eye Wash Stations With Self-Contained Water Sources*

1. A search was conducted in an effort to find commercially available self-contained safety showers and eye wash stations, but no commercially available sources were found. However, the new Digestion Unit will have a water booster pump that is connected to the emergency generator system that will provide safety water to the area even under conditions of a total power failure.

(k) *Workplace Examinations*

1. Kaiser will conduct workplace examinations as required by MSHA standards and track them, and needed corrective actions, on the plant computer system.

(l) *Training in Miner's Rights and Responsibilities*

1. Kaiser will expand its training on employee rights and responsibilities regarding safety and health.

(m) *Safety and Health Inspections*

1. The Kaiser and USWA joint safety and health committee will perform a comprehensive safety and health audit of the Gramercy Works Facility no less than semi-annually, and report the results, in writing, to Kaiser and the USWA. Kaiser will respond to the audit results in writing within fifteen working days. For each item identified in the audit, Kaiser will state the date for abatement, the means of abatement, or the reasons why, in Kaiser's opinion, abatement is not necessary to protect employees or its infeasible. Copies of the response will be given to USWA. Kaiser will consider time spent on the audit and associated meetings to be hours worked. The first audit will commence within sixty days from the date of the settlement agreement and will include a review of Kaiser's plans for rebuilding the plant and resuming production. Subsequent audits will consider both existing hazards in the facility, and the safety and health implications of changes to equipment or operating procedures planned by Kaiser.

2. (n) *Documentation*

1. Kaiser has and will continue to respond to MSHA document requests regarding regulatory compliance. Kaiser agrees to report to MSHA by letter, every six months for eighteen months, a summary of status of its efforts and activities described in this Exhibit, starting six months after the approval of a settlement motion.